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THE STRUCTURE AND FUNCTIONS OF THE ENGLISH
MAGISTRATES' COURT - A STUDY IN HISTORICAL SOCIOLOGY

MARTIN WINN

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University of Warwick

Department of Sociology

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SUMMARY

This thesis starts with a critique of existing sociological and criminological studies. The major argument here is that, although interactionist studies are an improvement upon their positivist counterparts, they suffer from the inherent weaknesses contained in their structural bias. Thus, although observational studies have been able to describe the effects of the process of interaction within the courtroom, they have been unable to explain why magistrates' justice is characterised by a relative lack of due process. In the main body of the thesis, we offer a structural analysis of the functions of magistrates' courts through an examination of the historical development of the magistracy culminating in its transformation in the middle of the nineteenth century. We show that the magistracy was created in its modern form as a lower court of summary justice specifically to act as an efficient method of punishing petty offenders with a conscious disregard for rights of due process. This did not simply reflect the interests of the industrial bourgeoisie but rather it was a product of the class struggle resulting from the particular formation of British capitalism, in which the gentry retained a powerful position. The central argument is that the particular form of justice that is administered in the lower courts of England and Wales reflects the compromise that was reached between these two sections of the ruling class in the period in which the modern magistracy was forged.

INTRODUCTION

This thesis began as an M.A. dissertation based upon a short observational study looking at the decision making process in magistrates' courts. At the time of conducting this research, it was intended that this would serve as a pilot study, leading to a similar, but longer and more thorough, study as the research base for this Ph.D.. However, the limitations of such a project soon became apparent. Not only was there little new to say about the nature of interaction within the courtroom and its effects upon magistrates' sentencing decisions and the characteristic features of magistrates' justice but, more importantly, the assumptions implicit within the framework of the observational study, that the legal inequalities in magistrates' courts resulted solely from the 'deviations' produced by court personnel - became increasingly difficult to accept. When sitting in the courtroom, even for a relatively short period, one could not help being impressed by the fact that the nature of the proceedings inside the courtroom was strongly influenced by external factors. Not only

were they restricted by the organisational practices of other institutions such as solicitors, probation officers and particularly the police, but also the vast majority of defendants were working class. This raised questions about the structural position of the magistrates' court and its role in punishing working class illegality that could not be adequately addressed through an observational study. Although it was possible to observe magistrates and other court personnel intimidate defendants and sentence on the basis of prejudices, for example, against the unemployed and in favour of the 'respectable' working class, this did not explain why working class petty crimes were dealt with in this way. By looking only at the exercise of discretionary power and the informal, routine arrangements developed by court personnel, I had taken the existence of the magistrates' courts for granted without asking why they existed in a form that enabled them to dispense such 'rough justice'. It was the realisation of this failure both in my own pilot study, and in the methodological and theoretical framework of observational studies of magistrates' courts, which led to the change of emphasis, in this

thesis, towards an attempt to explain, not just the content of magistrates' justice but also, its form.

The structure of this thesis reflects these developments in my thinking about magistrates' courts and the way in which they dispense "justice". Thus, in Chapters One and Two, we offer an appraisal of the achievements of interactionist studies in observing the process of social interaction which produces the discrepancies in sentencing rates and in further identifying a number of features of magistrates' justice which are barely hinted at in the official statistics. Having acknowledged their superiority over their positivist counterparts, we elaborate on our critique of a methodological position which provides a thorough description of proceedings in the magistrates' courts but does not allow an adequate explanation of its form. In developing this critique of the interactionist approach, we draw on the work of Doreen McBarnet who has shown that many of the features of magistrates' courts which are presented as the product of informal practices by court personnel are, in fact, reinforced by the structure of the

legal system and legal policy. However, we will see that, although her work constitutes a significant advance upon other studies in that it offers a structural analysis of magistrates' courts, she still does not explain why they function in this way.

This then leads us into the core of the thesis. In order to address the question of why magistrates' courts have emerged as a form of 'crime control' with little regard for the niceties of 'due process' that exist in the higher courts, we have examined the historical development of the English magistracy, focussing particularly on the moment in the mid-C19th when it was transformed from a powerful, all-embracing organ of local government into a lower court of summary justice, dealing with the bulk of criminal cases. However, before moving on to this analysis, we will pause firstly, in Chapter Three, to evaluate a number of historical approaches which bear upon our task and, secondly, in Chapters Four and Five, to consider the earlier development of the magistracy.

Unlike the analysis of the C19th developments that follows,

our discussion of the history of the magistracy from the C12th to the C18th is not based upon primary research, but rather it constitutes a reinterpretation of the material offered in more conventional histories of the magistracy. For this reason, the arguments presented in this section are the most tentative part of our overall thesis. Nevertheless, this examination of the earlier history will serve to both highlight the importance of the county magistracy as the power base of the gentry and the nature of the legal and political forms that they developed.

In Chapters Six, Seven and Eight, we will examine, in detail, the changes that occurred during the C19th and we will see that this transformation of the magistracy was influenced by its earlier history. We have divided this discussion into three parts. In Chapter Six, we will look at the process through which magistrates lost their control over local government, in Chapter Seven, we will examine their replacement in the maintenance of order by the new police and, in Chapter Eight, we will analyse the reform of the system of

prosecution which resulted in the emergence of magistrates' courts as courts of summary justice, dealing with a wide range of minor offences. Although we have drawn upon the conventional histories of the magistracy and the legal system, and a number of other secondary sources in developing the analysis in this part of the thesis, the arguments presented are based largely upon a study of the C19th Parliamentary Debates on the series of Bills that were introduced on each of these issues. A close reading of this material has enabled us to identify the manner in which the legal and political forms that emerged from the transformation of the magistracy represent a series of compromises resulting from the class struggle between the nascent bourgeoisie and the gentry. We will see that, because the gentry retained their parliamentary strength for most of the C19th, they were able to alter the nature of the new forms that were developed with the rise of industrial capitalism.

Although there have been further developments in the structure of the magistracy, in the late 19th century and in the 20th

century, which are not fully discussed in our analysis, they do not amount to anything like the fundamental transformation that occurred in the mid-C19th. This is not to say that there is nothing of interest to study after 1888. On the contrary, there is almost certainly another thesis to be written on the subsequent period, covering such things as the nature of recruitment, the political use of magistrates in, for example, the 1984-85 miners' strike, the relationship between magistrates' courts and the police, and the further erosion of due process, particularly in juvenile courts. However, our concern is to offer an analysis of the historical process that resulted in the creation of the English magistracy in its modern form. This was completed, in its essentials, in the middle part of the C19th and we have, therefore, restricted ourselves to a detailed examination of the changes that occurred during this period, and the nature of the class struggle that gave rise to the particular form of summary justice that emerged.

CHAPTER ONE

POSITIVIST AND INTERACTIONIST STUDIES OF MAGISTRATES' SENTENCING DECISIONS

Introduction

Studies of sentencing practices in magistrates' courts can be broadly divided into two opposing camps - positivist and interactionist. We will outline the main epistemological and methodological assumptions of both approaches and critically examine the contributions made to our understanding of judicial sentencing decisions by major studies on each side of the divide. Our central argument will be that, whilst the interactionists are better able to describe the processes inside the courtroom which underly sentencing decisions, they suffer from inherent limitations which render them unable to question the structure within which these decisions are made.

Positivism and the Interactionist Critique

When we classify a study as positivist we are referring to a set of assumptions (whether implicit or explicit) which

underly the research. The most fundamental of these assumptions are, firstly, that the social world is essentially similar to the natural world and, secondly, following from this, that the techniques of measurement and analysis developed for the study of the natural world can be used to study social phenomena.(1) Positivist social science assumes that, just as we can measure the mass, temperature, velocity, etc. of physical objects and develop laws about the relationship between them, so social phenomena can be measured through official statistics, questionnaires, etc. and that the data can be used to formulate lawlike statements about the relationship between social variables in the same way as the natural sciences are able to formulate laws about the behaviour of physical objects.(2)

Interactionist sociology in all of its different forms is united in rejecting these assumptions. The common starting point for all interactionists is that human beings are reflexive, that they are continually trying to make sense of their environment and, that, in this way, the social world is

socially constructed.

The term "symbolic interaction" refers, of course, to the peculiar and distinctive character of interaction as it takes place between human beings. The peculiarity consists in the fact that human beings interpret or "define" each other's actions instead of merely reacting to each other's actions. Their "response" is not made directly to the actions of one another but instead is based on the meaning which they attach to such actions. Thus human interaction is mediated by the use of symbols, by interpretation, or by ascertaining the meaning of one another's actions. This mediation is equivalent to inserting a process of interpretation between stimulus and response in the case of human behaviour.

H. Blumer Society As Symbolic Interaction p.180

Many phenomenological sociologists would take issue with the latent behaviourism in Blumer's statement but it does, nevertheless, capture the emphasis that all interactionists place upon "meaning" in the social world. Interactionists argue that it is because the social world is inherently meaningful and not "thing-like" that the methods used in the

natural sciences are not applicable to the study of social phenomena. This argument is summed up in the following extract from a paper written by one of the mentors of interactionist sociology.

This state of affairs is founded on the fact that there is an essential difference in the structure of the thought objects or mental constructs formed by the social sciences and those formed by the natural sciences. It is up to the natural scientist and to him alone to define, in accordance with the procedural rules of his science, his observational field, and to determine the facts, data and events within it which are relevant for his problem or scientific purpose at hand. Neither are those facts and events preselected, nor is the observational field preinterpreted. The world of nature, as explored by the natural scientist, does not 'mean' anything to molecules, atoms and electrons. But the observational field of the social scientist - social reality - has a specific meaning and relevance structure for the human beings living, acting and thinking within it. By a series of commonsense constructs they have preselected and preinterpreted this world which they experience as the reality of their daily lives. It is these thought objects of theirs which determine their behaviour by motivating

it. The thought objects constructed by the social scientist, in order to grasp this social reality, have to be founded upon the thought objects constructed by the commonsense thinking of men, living their daily life within their social world. Thus, the constructs of the social sciences are, so to speak, constructs of the second degree, that is, constructs of the constructs made by the actors on the social scene, whose behaviour the social scientist has to observe and to explain in accordance with the procedural rules of his science.

A. Schutz Concept and Theory Formation in the Social Sciences pp.11-12

This is the core of the interactionist argument i.e., to the extent that natural scientists are dealing with inanimate objects they are able to devise very precise methods of measurement for a wide range of phenomena but, by the same token, it is precisely because social scientists are not dealing with inanimate objects but reflexive subjects that, they are not able to utilise the same techniques. It is for this reason that interactionists have been so critical of the use of official statistics, questionnaires and experimental method in the social sciences. Although, they recognise some

uses for this data, they object to the uncritical use of these techniques. Thus, as one of the most widely read interactionist critics of positivist methods in social science has said:

The study of social structure by collecting facts such as births, deaths, age, marital status, and divorce does not pose a serious measurement problem. ... When sociologists become interested in accounting for and interpreting the trends in fertility within and between cultures, the examination of social facts per se can provide useful data for clarifying and pointing the way to the kinds of social action inherent in a particular kind of society...

A. Cicourel Method and Measurement in Sociology
p.195

Positivist Studies

It follows from the above that official statistics (and possibly questionnaires) may be useful as a point of departure

- they can pinpoint problems that may bear further sociological investigation - but they are inappropriate tools

with which to examine social action in any particular situation. This is precisely the case in the study of magistrates' sentencing decisions and the major difficulties with the positivist studies stem from their failure to appreciate this fact.

The major contribution of these studies has been to demonstrate the differences that exist in sentencing rates, both between different courts and within the same court. From even the most superficial examination of court statistics they have been able to demonstrate that certain groups are treated differently by the courts,(3) and that some courts dispense quite different treatment to others. The latter point is illustrated by Vilhelm Aubert's study of 5 military courts in Norway dealing with conscientious objectors who had refused to do military service in which he found that the acquittal rates varied from 54% in "Northern" court to 3% in "Western" court.(4) The same point is illustrated by Roger Hood's influential study of magistrates' courts in Britain, which began by looking at imprisonment rates for 12 magistrates'

courts in different parts of the country for the years 1951-1954. He found that in one year they varied from 3% in the most "lenient" court to 55% in the most "severe" court and that, on average for the four-year period they varied from 8% to 47%.(5)

However, although this information provided by the official statistics is interesting, it is only the starting point for an analysis of sentencing decisions in magistrates' courts. To document such widespread differences in sentencing begs the question of why these differences exist. Positivists have approached this question in a number of ways. Edward Green(6) takes the court statistics at face value and assumes that any differences therein reflect actual differences in the amount of criminality dealt with by the courts under study. He studied a non-jury prison court of the Philadelphia Court of Quarter Sessions during 1956-1957 in an attempt to determine the relative importance of both legal and non-legal criteria on sentencing decisions. He looked at sex, age, race, place of birth, the personal characteristics of the judge and the

prosecuting attorney, and, the plea and he concludes that none of these factors had an important effect on sentencing disparities. Rather:

The results of the investigation of the influence of legal and non-legal factors upon the severity of the sentences offer the reassurance that the deliberations of the sentencing judges are not at the mercy of passions and prejudices but rather mirror the operation of rational processes. The criteria for sentencing recognized in the law, the nature of the offence and the offender's prior criminal record, make a decisive contribution to the determination of the weight of the penalties; and in applying these criteria, the judges display a sensibility for the relative importance of each. The marked variations in sentencing according to age, sex, and race are due to differences in criminal behaviour patterns associated with these bio-social variables, not to hidden prejudice.

The findings concerning the differences in sentencing among the various judges are not clear in their implications. Although they reveal wide disparities, they show also an impressive degree of uniformity. Undoubtedly, individual differences in social background, personality, and penal philosophy sensitize the various judges differently to cases of a similar kind; but without specific infor-

mation on these factors for each judge, the precise nature and extent of their influence is problematic. It appears, however, that whatever proclivities they generate are appreciably checked by the legal criteria.

E. Green Sentencing Practices of Criminal Court Judges p.437

This unquestioning acceptance of the official statistics is a good example of the kind of crude positivism to which the interactionist critique is directed.(7) What Green ignores is the fact that official statistics (in this case sentencing rates) are actually social constructions composed of a series of decisions made by individual officials (in this case judges). These officials have discretionary powers and the way in which they use them will be determined by the meaning that they attribute to the actions and the actors that they are asked to adjudicate upon. If this is true for each individual case, then, the official statistics - which are nothing more than the summation of these cases - must also be determined in the same way. Green completely misses this point and his uncritical acceptance of the court statistics leads him into a

ridiculously tautological argument. He says that sentencing differences on the basis of age, sex, race, etc. are justified because they correspond to real differences in criminality but he takes as his measure of criminality the court statistics which are nothing more than a compilation of the judges' decisions that he is supposed to be studying.

It may be suggested that, because Green so clearly accepts the legal ideology, he is an easy target. This is probably true but a similar case can also be made against both Aubert and Hood(1962) who attempt to demonstrate the existence of extra-legal criteria. Aubert also considered the possibility that the differences in acquittal rates revealed by his study reflected differences in the nature of defendants appearing before the various courts but he rejected it because the two courts in his study with the highest conviction rates also exhibited a wide variation amongst the judges within those courts. He argued that if there were differences in the degree of criminality then this should affect all judges within the same district in a similar manner and, therefore, the fact

that this was not the case suggests that the differences in acquittal rates cannot be explained in terms of differences in criminality.(8) However, he cannot actually demonstrate this because the court statistics simply do not tell us why judges (or magistrates) behave in a particular manner. There are a wide variety of possible explanations for this finding some of which are consistent with the accepted legal criteria (eg. variations in the caseloads of different judges) whilst others are not (eg. variations in judges' attitudes) but official court statistics provide no means by which to examine the various possibilities.

Whereas Aubert recognised this limitation and did not attempt to go further, Hood, who did not have access to the dispositions of individual magistrates, devised his own measure of "criminality" using a complicated composite of the personal circumstances of the defendants appearing before the courts.(9) When he correlated his results with imprisonment rates he found that there was no significant relationship between the two.(10) It would appear to follow from this that

magistrates' sentencing decisions must be based upon extra-legal criteria. However, despite the ingenuity of Hood's device, we can only accept conclusions drawn from this technique if we are prepared to accept the court statistics uncritically. This is because Hood's measure of criminality is itself derived from the court statistics. The information that he collected on the eight characteristics of the defendants was all taken from the court records.(11) This leads Hood into the absurd position in which his conclusions contradict the assumptions behind his methodology. By using the court statistics to compound his measure of criminality, Hood is accepting them at face value and assuming that they do in fact represent the level of "criminality" in the area. However, if we accept his conclusion that magistrates' sentencing decisions are based upon extra-legal criteria, then the court records - which are the accumulation of these decisions - cannot provide an unambiguous measure of the degree of criminality and, therefore, Hood cannot substantiate his argument that differences in sentencing decisions are due to non-legal factors.

We can see then that positivist methodology presents considerable difficulties for researchers who wish to address themselves to the relatively straightforward question of whether differences in sentencing rates are due to legal or extra-legal factors. If the limitations of positivist method do not even allow broad statements of this nature then, when we come to the problem of determining the nature of the extra-legal factors behind sentencing decisions, it is totally inadequate. It is to Aubert's credit that he acknowledges this limitation. One of his most important findings was that defendants who objected to military service on religious grounds were almost certain to be acquitted (even though this criterion had only been adopted informally by the judges). His research also revealed that, in the two courts with high conviction rates, the number of defendants pleading on the basis of religious beliefs was low. The obvious conclusion to be drawn from this would be that the high conviction rates were due to the relative lack of religious beliefs, but Aubert sounds a note of caution and, in doing so, illustrates the problems involved in drawing even such apparently straight-

forward inferences from the court statistics.

We must in any case allow for the possibility that the relationship may, in fact, be the following: When so many objectors before the Southern and Northern courts are characterised as nonreligious, it may be that the courts have found them guilty on other grounds but relied on the argument of lack of religious belief, since it can reasonably be invoked to indicate the absence of sufficiently serious beliefs against doing military service.(12)

V. Aubert Conscientious Objectors before Norwegian Military Courts p.209

Aubert would like to offer an explanation of sentencing patterns but to do so he has to address the question of why the judges took the set of decisions that gave rise to the court statistics but this is a question about the motivation of the sentencers and the meaning that they attach to events and behaviour within the courtroom and as such it cannot be answered from the court statistics.

In the above passage, Aubert is acknowledging this problem - one of the most fundamental problems confronting positivist

studies of law courts - but he appears to be resigned to it. Hood(1972), on the other hand, attempted to overcome the problem by devising a battery of tests designed to measure magistrates attitudes and the meanings which they attached to motoring offences. Here again we can bear witness to Hood's ingenuity but, as we will discover, his tests tell us little about the sentencing behaviour of magistrates. His attempt to measure the non-legal factors had begun in his earlier study when he devised his own composite measure of the social structure of the various areas.(13) Using this device, he found that the group of courts with high imprisonment rates tended to have:

...a less dense population, less overcrowding, fewer men in social classes IV and V, more men aged twenty to twenty-four educated over the age of seventeen, and smaller populations (when considered as isolated urban areas). These towns are older communities, have known traditions of peaceful living, and are the home of small light industries. In general descriptive terms they are more residential, with a higher proportion of middle-class inhabitants and a generally parochial air. These towns may have a

greater 'consciousness of community' than large urban areas as well as a 'common conscience' which highly respects private property.

R. Hood Sentencing in Magistrates' Courts p.75

If we ignore his assertions about the nature of community in these towns, Hood's use of the census data in this way is relatively unproblematic. However, it is subject to the limitations of positivist studies that we have already identified. In this case, the data implies that there may be a relationship between magistrates' social backgrounds and their attitudes towards crime but it does no more than suggest possible avenues for research. This data did not enable Hood to say much about this relationship because it did not provide any information about magistrates' backgrounds or opinions.

In an attempt to overcome these limitations, in his second study of sentencing decisions in magistrates' courts he abandoned the official statistics in favour of his own devices designed to examine the process behind magistrates sentencing decisions in detail.(14) This study employed three main tech-

niques. Firstly, Hood attempted to measure the personal characteristics of the magistrates in his sample. To do this he used an interviewing programme, two self-completion questionnaires and an Eysenck Personality Inventory. The first questionnaire, which asked the magistrates to rank a list of nineteen offences (eight motoring and eleven others) in order of seriousness, was designed to measure their perceptions of the seriousness of motoring offences. The second questionnaire presented the magistrates with four stereotyped views of offenders and asked them to say, for each of seven motoring offences, what proportion of offenders fell into each stereotype.(15) The Eysenck Personality Inventory was supposed to measure two aspects of the magistrates personalities - introverted / extraverted and stable / neurotic. Secondly, he sent copies of the same selection of eight printed cases to a sample of magistrates, together with a questionnaire asking them how they would have dealt with the case. They were asked "...to decide on the appropriate penalty, to give their reasons for it and to say whether they wanted more information about the offender, whether they would have retired to

consider the sentence, to what extent they thought their decision reflected what their colleagues would have done, and lastly to rate how serious 'of its kind' the case was."(16)

Thirdly, Hood arranged conferences at six magistrates' courts where the magistrates were divided into groups of twos and threes in order to participate in the 'information game' that he had devised. The groups were presented with a hypothetical case and were asked to adjudicate upon it. Their decision was then recorded, a specific item about the offence or the offender was changed and the magistrates were once again asked to adjudicate upon the case. This process was repeated several times. The aim of this experiment was to enable Hood to examine the reactions of magistrates to small differences in the nature of the case and thus to study the sentencing process in fine detail.

The weaknesses of the Eysenck Personality Inventory have been documented many times(17) and there is nothing for us to add except possibly surprise that Hood appears so oblivious to its shortcomings. Rather, we will concentrate our attention on the

other techniques that he used to obtain his data. Firstly, let us look at the questionnaire in which he asked magistrates to rank nineteen offences according to their seriousness. Even if we accept that it is possible to rank this number of items meaningfully (which is doubtful), what the data produced from this test tells us is simply that, for each individual magistrate, she/he perceives the offence ranked 1 as being more serious than that ranked 2 and that this, in turn, is perceived as being more serious than that ranked 3, and so on until the offence ranked 19 is perceived as being the least serious. In other words, the data only provides information about the relative perception of the seriousness of these offences. It does not provide information of an absolute nature. We cannot assume, for example, that the difference between rank 1 and rank 2 is equal to that between rank 2 and rank 3. Nor can we assume that the rankings of one magistrate can be equated with those of any other magistrate. There is no reason whatsoever why, because two magistrates have given an offence the same ranking that, they should both perceive it as being equally serious. It may be that one person believes that

all crime is very serious whilst another sees all crime as trivial. It would therefore be wrong to assume that, because they both rank shop lifting sixteenth on their list, they attached equal seriousness to this offence but this is exactly what Hood does when he collates the rankings of individual magistrates to produce a mean ranking which he presents as the collective view of his sample. We should therefore view any results produced from this technique with caution.

The other questionnaires used by Hood did not involve this ranking technique and are not, therefore, subject to the same criticisms. However, this is not to say that they are not problematic. When he sent questionnaires to the magistrates asking them to adjudicate on a number of hypothetical cases, Hood believed that this enabled him to hold constant all details about the offence and the offender "...the only variables being those associated with the magistrates making the decisions." (18) In other words, he believed that he was providing "pure" data on the sentencing behaviour of individual magistrates (which could later be correlated with his

data on the various aspects of their personalities). Unfortunately there are a number of serious flaws in the logic of Hood's methodology here.

Firstly, the meaning of sentencing decisions is problematic and it cannot simply be assumed that some sentences are more severe than others.(19) This does not necessarily invalidate Hood's research technique - it may be possible to include items on the questionnaire which provide the information required to check whether or not there is any reason to suppose that sentencing decisions have any special meanings. Nevertheless, the fact that Hood did not attempt to explore this possibility weakens the plausibility of his data. Secondly, Hood's assumption that, by giving all of the magistrates in his sample the same details about the offence and the offender, he was able to hold these variables constant can only apply if the magistrates perceive these details in the same way but this is unlikely to be the case. There are a wide range of possible ways in which the magistrates may interpret the details with which Hood furnished them. At one extreme,

some of the magistrates may read these details as describing a serious offence committed by a hardened offender whilst, at the other extreme, others may perceive a trivial incident committed by a "normal" person. The crucial point is that Hood assumes that everybody will interpret the raw material in the same way and, as a result, his method does not even attempt to measure these understandings.

Thirdly, Hood's questionnaire also assumes that the magistrates will respond in the same way as they would in "real life" and this too is a dubious assumption. When the magistrates in Hood's sample made their response to his questionnaire it is inevitable that they will have attempted to "make sense" of that particular situation by asking themselves questions such as "what is the study really getting at ?". In answering this question, it is possible that their understanding may have differed significantly from that of Hood although, insofar as his respondents were likely to share a similar social and cultural background to Hood, this seems unlikely.(20) However, as Phillips has pointed out, in his

text on research methods, those people who are best able to understand the researcher's questions are also better able to manipulate their answers.(21) This may take the form of deliberate sabotage although our own commonsense understanding suggests that this is also unlikely to have been a serious problem in Hood's study. Much more likely is the possibility that the magistrates will attempt to create the impression that they act responsibly in their magisterial capacity.(22) Exactly how this will affect their responses will depend upon what they consider to be responsible practice but we can suppose that it might include such things as weighing the evidence carefully, giving proper consideration to the nature of the offence and the offender, etc.

Thus, despite the apparent scientific nature of Hood's questionnaire, this technique does not enable him to measure magistrates' sentencing behaviour. Even if this method of research produced the results that Hood claims, it would still be inadequate because the magistrates' sentencing decisions on these hypothetical cases are taken out of the context of the

courtroom. When we examine the interactionist studies we will see that a complex drama is enacted inside the magistrates' courts and that the sentence is a product of this drama. Thus any attempt, such as Hood's, to study magistrates' sentencing decisions in isolation from the courtroom drama can never be more than a partial study. The third stage of Hood's research, in which he assembled magistrates at conferences, could possibly be seen as a response to this problem. At these conferences he attempted to recreate courtroom conditions insofar as he grouped the magistrates into twos and threes. However, this part of the research programme is subject to many of the same criticisms as his use of questionnaires. Hood believed that the 'information game' that he had devised for the occasion would enable him to isolate specific variables whilst keeping all else constant, thus enabling him to study the sentencing process in minute detail.(23) However, once again, he has ignored the fact that human subjects are reflexive and that they will attempt to form their own understanding of the situation. In the case of Hood's 'information game' it is not difficult to imagine how this might have

affected his results. Even if we are prepared to allow that the magistrates' adjudications on the original case were a reliable reflection of the way in which they would have acted in the courtroom, it is too much to expect that their adjudications on subsequent rounds of the 'game' would not have been influenced by their awareness of what was being examined. This part of Hood's study is similar in nature to a laboratory experiment and, as such, it is subject to the same problems - i.e., demand characteristics. A number of studies have noted that subjects in laboratory experiments are affected by their understanding of the purpose of the experiment and that they behave in ways that they believe will help the researcher to get the desired results.(24) In Hood's study, in which only one item of the case was altered on each round of the 'game', the magistrates could not help being aware of what was being studied and so, if we assume that magistrates are similar to other human subjects, they too are likely to respond in a way that they believe will help Hood's research. In particular they will be likely to alter their sentences as the game progresses even if this is not what they would have done in

the courtroom.

Once again then we see that Hood's research programme has failed to supply the kind of quantifiable data on magistrates' sentencing behaviour that he wants to be able to offer. We cannot help being impressed by the ingenuity with which Hood has devised his own research tools in his attempt to gather this data but all of his efforts are frustrated by the fact that he consistently fails to realise that the nature of the social world will not allow him to successfully perform this task. Hood has failed to realise that data on such things as magistrates' attitudes cannot be obtained through the use of quasi-scientific research techniques because such methods are inappropriate for use when studying thinking subjects who interpret events and situations including the very research methods that Hood and other positivist researchers use to study them. If we wish to examine magistrates' decision making, we must accept that we will not be able to achieve the same degree of precision that natural scientists often enjoy and look for alternative methods of study more suited to the

nature of our subject matter.

Interactionist Studies Of Law Courts

Interactionist studies of law courts have been designed to overcome the sort of problems that we have identified with Hood's methods. Whereas Hood has tried to study magistrates' sentencing decisions 'scientifically' in controlled conditions, interactionists have entered the courtroom to study magistrates in action. We have chosen to illustrate the interactionist position through the example of Emerson's study of a juvenile court in a large city in the northern United States.(25) Because it was carried out in the U.S.A., it is concerned with judges' rather than magistrates' sentencing decisions but his findings have been confirmed by a number of less extensive British studies and the broad pattern of Emerson's findings applies equally to magistrates' courts.

(26)

In the court studied by Emerson, the judge heard complaints for delinquency (usually brought by the police) and he/she had

to decide: (a) whether the youth was "delinquent" or "not delinquent", and (b) what subsequent action to take (i.e. what sentence to pass). In 1966 (the year in which Emerson conducted his research) only 7% of all complaints led to a finding of "not delinquent" and Emerson therefore decided that the major focus of his study ought to be the judges' dispositions.(27) On the basis of his courtroom observations (from January 1966 to May 1967) together with informal interviews with court personnel, he concluded that the most important criterion underlying the judges' dispositions was the identification of "trouble". Emerson found that trouble was regularly identified under two sets of conditions: Firstly, when the defendant was charged with a serious offence there was an automatic assumption of trouble, and; Secondly, when certain patterns of behaviour and social circumstances that were felt to precede serious delinquent or criminal activity were present, even if the current activity was trivial. Emerson suggests that under both conditions "trouble" is essentially a predictive construct.

The fact that a youth has committed a serious offence is of particular interest to the court partly because it suggests that he may well do it again; such a delinquent has shown himself to be the sort of person who might so behave. When current behaviour is minor or trivial but the court feels 'trouble' is present, it is judging that such conduct, in light of attendant circumstances, is 'symptomatic' of involvement in a delinquent career.

R. Emerson Judging Delinquents p.87

Emerson goes on to argue that this search for trouble leads to a focus away from what actually happened towards a consideration of the question "what is the problem here ?". Following Matza,(28) he argues that the facts of the case become unimportant and that explanations are sought for, instead, in the character and background of the individual offender. According to Emerson, the court distinguished three types of moral character - "normal", "criminal", and "disturbed" - which he describes as types of typical delinquency.(29) Those offences which appeared to be consistent with conventional lifestyles were likely to be considered "normal" and dealt with more leniently, whereas those offences which did not have

this appearance were likely to be seen as "criminal" or possibly "disturbed".

To consider a concrete example, the court recognises three distinct social events as possible occurrences within the formal offense category of 'assault'. On the basis of the implied moral character of the actors involved, these can be termed typical normal, criminal and disturbed assaults. First, a typical normal assault involves a 'fight' and highlights the following features of the delinquency situation: the scene is usually a street; the combatants are children, usually boys but sometimes girls; fists or weapons picked up in the heat of the battle are the rule; both parties appear to have contributed to the incident. In such cases, while there may be fairly serious injury, the 'offense' itself is considered minor, growing out of an often childish disagreement between the youths well known to each other. 'Fights', then are perceived as natural incidents usually involving normal actors.

Second, an assault may involve circumstances that indicate criminal character. Such criminal assaults involve attacks on strangers and nonpeers with robbery as the apparent motive. Criminal assaults are typically 'muggings' where a lone male, often a drunk or homosexual, is grabbed, roughed up, and relieved of his money by a small group of older,

tough delinquents, in a public but deserted area. Criminal assaults are often described as 'vicious'; they are regarded as extremely serious, for potentially they involve murder.

Third, typical disturbed assaults occur without apparent robbery motives, but generally in similar settings. The victim, previously unknown and not robbed, is assaulted for no apparent 'reason'. Here the violence may be interpreted as an irrational outburst of aggression or hostility. Disturbed assaults too indicate viciousness, often even more dangerous because of its gratuitous and unmotivated nature.(30)

R. Emerson Judging Delinquents pp.109-110

This observation that judges divide defendants into three distinct groups is interesting in itself . However, of more fundamental importance is the fact that Emerson is not only able to say that non-legal criteria are an important influence on judicial sentencing decisions in the lower courts but also that he is able to say something about the nature of these criteria and how they work. Underlying his observations about the judges' identification of "trouble" is the more fundamental observation that sentencing decisions are determined by

the subjective classification of defendants on the basis of their "moral character" rather than the crime per se. Emerson shows how the judges attempted to establish the moral character of the defendant from the variety of cues that they picked up in the courtroom. Sometimes these cues were "obvious" - as in the case of the 16 year old boy accused of breaking into a church social centre who was caught on the roof at night with wirecutters and other tools in his possession.(31) At other times the judges found their clues about the moral character of the defendant in minor details about the case. Consider the following case from Emerson's research notes.

Two older girls who had run away from home and been caught shoplifting in a department store claimed they had spent the night in a doorway. The judge seemed reluctant to accept the story, and asked the arresting officer if the girls had been 'clean' when he caught them. The policeman said no, and added that the blond girl had been wearing eye make-up and had her hair done up.

R. EMERSON Judging Delinquents p.112

When commenting on this case, Emerson says:

Here it can be noted that a typical normal runaway by girls involves staying away from home and living on the streets for a day or two following a family argument. This fades into a more criminal-like runaway, where the girls become involved in prostitution. Hence it becomes critical to determine where the runaways spent the night, and the court routinely questions runaways about this and other topics pertaining to living 'on the streets'. The answer here that the night was spent in a doorway arouses the judge's suspicion. He then attempts to gauge the nature of this runaway's episode by asking the police officer about the girls' appearance at the time of the arrest (on the assumption that had they indeed stayed in some doorway they could not stay 'clean', while if they had been in an apartment somewhere they would have). The policeman's answer is ambiguous in this respect, since he reports that they were clean, but that one girl was heavily made up, a possible indicator of prostitution. Nonetheless, the circumstances of this inquiry clearly suggest how one minute aspect of a report may shape the perceived nature of a delinquent act (i.e., determine the class of typical delinquency in which it will be placed).

R. Emerson Judging Delinquents p.112

The importance of a wide variety of 'cues' - such as language,

physical appearance, and, the general presentational style of the defendant - in influencing the way in which judges and magistrates interpret any particular case has been confirmed by other interactionist studies.(32) Although they differ over the details of Emerson's analysis a number of them have reported that magistrates categorise defendants in ways similar to those suggested by Emerson(33) and they all confirm his conclusion that interpersonal interaction in the courtroom is of paramount importance in the determination of sentencing decisions.

In addition to these observations about the ways in which judges and magistrates classify defendants on the basis of subjective criteria, interactionist studies have also been able to comment on the influence that other court personnel may have upon sentencing decisions. Because of their presence inside the courtroom, they cannot help noticing the complex drama that is enacted and the effect that this has on the final outcome of any particular case. Emerson, for example, is able to show that the evaluation of the defendant's moral

character is the end product of a complex process of interaction in the courtroom involving all of the court personnel who are attempting to portray an image of the defendant consistent with the disposition that they are aiming for.

Moral character is not passively established. It is the product of interaction and communicative work involving the delinquent, his family, enforcers, complainants generally, and the court itself. Specific versions of moral character must be successfully presented if they are to be adopted by others. Officials, who play the dominant role in the process, both directly communicate their opinions of the moral character of the youth involved and more indirectly make selective reports of incidents and information pertinent to the court's evaluation of this character. In general, the version of the moral character finally established is negotiated from among these presented 'facts', opinions, and reports.(34)

R. Emerson Judging Delinquents p.101

We can see then that the methodology adopted by the interactionists enables them to study the judicial sentencing process much more fully than their positivist counterparts. However,

whilst it is important to recognise their achievements, it would be wrong to assume that they are entirely unproblematic. On the contrary, there are a number of major limitations to the use of interactionist studies. We have already seen that positivist studies are actually better equipped to provide certain kinds of factual information but there are also certain standard criticisms that can be levelled against any interactionist study. In particular it has been suggested that their results are not objective because they are based upon the subjective interpretations of the researcher. The point here is that, if the social world is inherently meaningful as the interactionists claim then, how can the researcher "know" the meanings which (in this case) magistrates attach to their actions. Interactionist sociologists have responded to this criticism in different ways according to their own particular style of research. Howard Becker, for example, argues that a good participant observation study could be reproduced by another researcher and that it is, therefore, objective research.(35) Alfred Schutz and some ethnomethodologists, on the other hand, argue

that the problem can be overcome by using 'epoche' - a process in which the researcher is supposed to suspend his/her commonsense assumptions about the particular part of the social world being studied.(36) The problem with both of these arguments is that they seem to contradict their own assumptions about the nature of the social world - i.e., they seem to be suggesting that, although the social world is socially constructed and inherently meaningful, this does not apply to sociologists who are somehow able to extricate themselves from the entanglement of social constructions to witness them from a distance.

It is not our intention here to become embroiled in what has been both a passionate and complex debate about the merits of interactionist methods as opposed to those used by 'conventional' sociology. Rather, what we want to suggest is that this debate has served to obscure a more fundamental weakness that is inherent in both positivist and interactionist studies of magistrates' sentencing decisions. The hostile debates that have taken place between interactionists

and positivists have helped to create the impression of almost total opposition between the two camps but if we look beyond this methodological argument to the assumptions of both groups about the structure of society we reveal a more fundamental unity between them. Thus, although interactionist studies may tell us more about the processes that underly magistrates' sentencing decisions they, like their positivist counterparts, are restricted by the astructural bias which, is inherent in their epistemological position. Thus, a leading interactionist writes:

These respective concerns with organization on the one hand and with acting units on the other hand set the essential difference between conventional views of human society and the view of it implied in symbolic interaction. The latter view recognises the presence of organization in human society and respects its importance. However, it sees and treats organization differently. The difference is along two major lines. First, from the standpoint of symbolic interaction the organization of a human society is the framework inside of which social action takes place and it is not the determinant of that action. Second, such organization and changes

in it are the product of the activity of acting units and not of 'forces' which leave such acting units out of account. ...

From the standpoint of symbolic interaction, social organization is a framework inside of which acting units develop their actions. Structural features, such as 'culture', 'social systems', 'social stratification', or 'social roles', set conditions for their action but do not determine their action. People - that is, acting units - do not act toward culture, social structure or the like; they act toward situations. Social organization enters into action only to the extent to which it supplies fixed sets of symbols which people use in interpreting their situations.

H. Blumer Society As Symbolic Interaction
pp.189-190

In this passage, Blumer offers a clear rationalization for a sociology that is prepared to accept the existing social structure as given in order to study the ways in which individuals interact with one another. This kind of committed individualism can be seen in many of the studies of magistrates courts. One particularly good example is provided by Max Atkinson and Paul Drew who preface their book by saying

that they are only interested in the organization of talk in the courts and with the ways in which the participants manage the business of the courts within the constraints imposed by that organization.(37) They argue in favour of Garfinkel's ethnomethodology because it showed that:

The basic theoretical question was no longer to be the obstinately unanswerable one of WHY in principle social order is as it is (or claimed to be). Rather it was to become that of HOW for practical purposes are particular manifestations of social order achieved?

M. Atkinson & P. Drew Order In Court p.21

Atkinson and Drew represent an extreme position within the spectrum of interactionist sociology and there are many interactionists who would dispute their claim that questions about why the social order is the way it is are irrelevant.(38) However, although Atkinson and Drew take the logic of the interactionist position to its extreme it is, nevertheless, the logic of interactionism. All interactionist studies confine themselves to studying the interactive processes that

take place within the courtroom whilst taking the wider structure in which it is located for granted. By doing this they have consistently ignored questions about the structural position of the magistrates' court. This does not mean that these studies are invalid but it has meant that, although we have learnt a great deal about the ways in which magistrates exercise their discretionary sentencing powers, there has been precious little analysis of why these courts exist in this particular form.

Summary

In this chapter we have seen that those researchers who have attempted to study the judicial sentencing process through positivist methods have failed because of the inherent limitations in their methodology. They have been able to use court statistics to point to wide variations in sentencing rates but, although they have often correctly suspected that these are the product of extra-legal criteria, they have been unable to demonstrate this successfully. Interactionist studies have been able to overcome these difficulties by devising

alternative methods based upon the observation of behaviour in its context. The presence of interactionist researchers inside the courtroom has enabled them to demonstrate, not only the existence but also, the nature of the extra legal factors that determine sentencing decisions. In addition they have been better placed to examine the interactive process between court personnel through which sentences are reached. Whereas positivist studies have tended to assume that magistrates simply hear the evidence and then adjudicate upon the case, interactionist studies cannot help noticing the complex drama that is enacted within the courtroom and the effect that this has on the final outcome of any particular case.

However, despite the achievements of the interactionist studies, we have seen that they are not as radically different from their positivist counterparts as the methodological debate has tended to suggest. Although they are better able to study the process that occurs inside the courtroom, they too accept the structural framework of the legal system in general and the magistrates' court in particular. In the following

chapter, when we look at the contribution that observational studies have made to our understanding of the broader nature of magistrates' justice, we will develop this argument further and present the case for a structural analysis of the magistrates' courts more fully.

CHAPTER TWO

THE ADMINISTRATION OF JUSTICE IN MAGISTRATES' COURTS

Observations Of Magistrates' Justice

In Chapter One we have restricted ourselves to a discussion of magistrates' sentencing decisions. This was a necessary limitation arising largely out of the nature of positivist studies. Because of their heavy dependence upon official statistics, they have only been able to study those details of court proceedings which are officially recorded. Although we have seen that there are important aspects of the sentencing process which do not show up clearly in court statistics, there are other dimensions of the internal workings of the court which are barely hinted at and about which positivist studies have said virtually nothing. These limitations are summarised by Mileski when she says:

The court, like many formal organizations, has no interest in maximising outsiders' access to information about its ongoing activities. In consequence,

certain of its operations go unrecorded. The courtroom clerk, for example, does not make a notation of each time the judge scowls at a defendant or appears incredulous at a defendant's account of his behaviour. Furthermore, plea-bargaining encounters are conspicuously omitted. Something similar to the 'blue curtain' that hangs about police departments surrounds the court and creates an intelligence problem for the outsider who would use what the court writes down about itself.

M. Mileski Courtroom Encounters p.475

Interactionist studies, because they have eschewed official statistics in favour of observational methods, have been able to peer behind this curtain and in doing so they have observed a number of features of magistrates' justice which could not have been revealed from a positivist study. In addition to witnessing the fact that the vast majority of defendants in magistrates' courts are working class(1), interactionist studies have also been able to tell us a good deal about the ways in which "justice" is routinely administered. A number of studies have commented on the speed with which cases are dealt with in the lower courts(2) whilst others have described ways

in which magistrates' courts degrade and coerce defendants. A particularly good example of the latter is provided by Pat Carlen's study of a London magistrates' court. On the basis of her observations she was able to show how routine procedures in the courtroom may serve to debilitate defendants.

In magistrates' courts, where the vast majority of defendants do not have a solicitor as a 'mouthpiece', defendants are set up in a guarded dock and then, at a distance artificially stretched beyond the familiar boundaries of face-to-face communication, asked to describe or comment on intimate details of their lives; details which do not in themselves constitute infractions of any law but which are open to public investigation once a person has been accused of breaking the law. ...

Further, during such sequences of interrogation, defendants' embarrassed stuttering is often aggravated by judicial violation of another taken-for-granted conversational practice. For in conversational social practice the chain-rule of question-answer sequence is also accompanied by the assumption that it is the interrogator who demands an answer. In magistrates' courts, however, defendants often find that they are continually rebuked, either for not addressing their answers to

the magistrate or for directing their answers to their interrogators in such a way that the magistrate cannot hear them. As a result, defendants are often in the position of having to synchronise their answers and stances in a way quite divorced from the conventions of everyday life outside the courtroom. ...

For defendants who often do not immediately distinguish between magistrate and clerk, for defendants who do not comprehend the separate symbolic functions of dock and witness box, for defendants who may have already spent up to three hours waiting in the squalid environs of the courtroom, the surreal dimensions of meaning, emanating from judicial exploitation of courtroom placing and spacing, can have a paralysing effect.

P. Carlen Magistrates' Justice pp.23-24 (original emphasis)

In the above passage Carlen is pointing to the fact that court procedures which are familiar to regular court personnel may contravene normal patterns of communication resulting in confusion, bewilderment and possibly humiliation for the defendant.(3) A little later she shows how the defendants' presentational style may be further cramped by the battery of

commands to which they were continually subjected.

All defendants are escorted into the courtroom by the policeman calling the cases. Once the defendant is in the dock the escort acts as a kind of personal choreographer to him. He tells him when to stand up and when to sit down (often in contradiction to the magistrate's directions!), when to speak and when to be quiet, when to leave the dock at the end of the hearing. During the hearing the policeman can tell the defendant to take his hands out of his pockets, chewing-gum out of his mouth, his hat off his head and the smile off his face. Thus even at the outset a series of physical checks, aligned with a battery of commands and counter-commands, inhibits the defendant's presentational style. Once he is in the distraught state of mind where he just 'wants to get it over', judicial fears that he might slow down the proceedings by being 'awkward' are diminished.

P. Carlen Magistrates' Justice p.29

In her work, Carlen has concentrated on the ways in which the courtroom environment may intimidate defendants but, as McBarnet has shown,(4) even when defendants are not intimidated in this way, courtroom procedures can still debilitate defendants. McBarnet cites a number of cases from her research

notes in which defendants were effectively prevented from representing themselves in court because they did not understand the formalities involved in conducting a cross-examination(5) and others in which unrepresented defendants were hampered in the presentation of their case by the interruption and criticism from magistrates.(6) She also found that competence on the part of defendants to conduct their own cross-examination was likely to provoke suspicion i.e., it was seen as evidence of criminality.(7)

Various studies have shown that the vast majority of defendants in magistrates' courts are not represented(8) and, therefore, these problems are likely to be commonplace but those defendants who are legally represented also face problems. Although they ought to benefit from the legal competence and professional status of a solicitor or lawyer, it has been found that defence solicitors may conspire with the prosecution in what Blumberg describes as: "a large variety of bureaucratically ordained and controlled 'work crimes', short cuts, deviations, and outright rule violations

adopted as court practice in order to meet production norms." (9) The form that these court practices take includes informal "chats" beforehand, tacit agreements that neither defence counsel nor prosecutor should be too zealous in the presentation of their case and the various forms of plea-bargaining. (10)

When we put these findings together with the large numbers of people dealt with by magistrates' courts, (11) the findings of these observational studies raise serious questions about the kind of justice that is being administered in English magistrates' courts. The finding that so many people are pleading guilty, (12) being sentenced and, in many cases being sent to prison without the benefit of legal representation by courts which coerce defendants does not fit with conventional beliefs about the role of the trial in the British legal system which usually involve the notion of two equal parties battling before an independent judge. Observers of proceedings in the magistrates' courts have consistently reported that these beliefs do not match reality, and a number of them have

commented on the "rough and ready kind of justice" administered in the magistrates' courts.(13) However, although these studies have been able to describe the nature of magistrates' "justice", their observational methods have made it difficult to explain them. This dilemma is well illustrated in Carlen's work. Having described some of the ways that magistrates' courts degrade and coerce defendants she wants to offer an explanation of why this situation exists. She says:

For the defendant, it is not the world of Lucky Jim which is actualised in the language and process of the law but the legal reality of a systematically criminalised and ideologically professionalised capitalist society.

P. Carlen Magistrates' Justice p.95

Whilst we might sympathise with Carlen's insistence that we must understand magistrates' courts and their administration of justice in relation to their position in capitalist society, she does not succeed in demonstrating this relationship. The above remarks, together with other comments in a

similar vein which are scattered throughout her book, are mainly rhetorical. Here is a good example of an interactionist with radical aspirations trapped within the limitations of an observational study. Sitting in a courtroom for six months enabled her to gather data on the interactive processes that occur in magistrates' courts but this data cannot be used to address questions about the structural position of the magistrates' courts themselves. Such questions must be addressed before the study commences and if - as has invariably been the case with interactionist studies of magistrates' courts - they are not, the research is forced to take the role of the magistrates and their courts for granted. Once the study is underway, the researcher (as in Carlen's case) may wish to question taken-for-granted assumptions about the nature of the justice dispensed, but the data yielded from the study can only describe the characteristics of the justice that is administered in magistrates' courts - it cannot explain why they take this form.

In fact, most researchers who have commented on the nature of

magistrates' justice have not attempted to relate it to the broader structure of society. Rather, their explanations have been in terms of the "bureaucratic" pressures that exist in the magistrates' courts and the informal practices which regular court personnel have developed in order to cope with them. Thus, the high proportion of guilty pleas has often been explained in terms of the pressure which court personnel exert on defendants to plead guilty. It is pointed out that when the defence counsel and the prosecution strike a bargain to reduce the sentence in return for a guilty plea they both stand to gain from the transaction. The prosecution gain in so far as the courts are able to process more cases and the defence solicitors gain because guilty pleas shorten the length of the 'trial' thus enabling them to deal with more cases in each session which, in turn, enables them to increase their income.(14)

Although plea-bargaining has received considerable attention in recent years, there are other dimensions to the operation of organisational efficiency in the magistrates' court. For

example, Bottoms and McLean suggest that opposition to bail is often based on police convenience in pursuing enquiries rather than reasons associated with the administration of justice.(15) The Release Lawyers Group further suggest that organisational pressures affect the way that the everyday business of the magistrates' court is conducted.

Where cases are dealt with by magistrates' courts, overburdened lists frequently cause both the bench and the clerk to try to hurry things along. Most of us can recall occasions when our questions to witnesses, submissions or addresses to the court have been cut short by impatient magistrates or their equally impatient clerks. Evidence of the cursory way in which some of the lower courts conduct their business can be found in the Cobden Trust Report 'Bail Or Custody' (King 1971) where the average time for bail applications was found to be three minutes, and where many unrepresented defendants were ushered away to prisons or remand centres without having uttered a single word in court. We have experienced cases where magistrates have refused requests for short adjournments to enable the defendant to find vital witnesses. One of the solicitors among us reports an incident when, after waiting until 1 o'clock to be heard, he and

his client were hurried into a back court and he was told by the clerk that he had "15 minutes flat" for the case to be heard. On another occasion at the same court the magistrate passed sentence on the accused before he had heard any plea of mitigation from her lawyer."

The Lawyers Release Group Guilty Until Proved Innocent p.19.

Observational studies of magistrates' courts have provided us with ample evidence of the ways in which regular court personnel routinely adopt informal procedures in order to make the administration of 'justice' more 'efficient'. In doing so, they have demonstrated the importance of bureaucratic pressures but there is a major problem with this kind of explanation residing in the distinction that they make - either implicitly or explicitly - between the Due Process Model and the Crime Control Model of the criminal process. These terms derive from an article by the American jurist Herbert Packer.(16) In the article, he describes the Due Process Model as an 'obstacle course' resulting from the belief that penal sanctions are seen as the heaviest

deprivation that a government can inflict upon individuals.

"The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty." (17) Thus, the criminal process must be subjected to controls and safeguards involving the assumption of innocence and the undesirability of error. It is not sufficient to show that, in all probability, the defendant did factually what he/she is said to have done:

Instead he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to safeguard the integrity of the process are not given effect.

H.Packer Two Models of the Criminal Process p.16

The Crime Control Model, on the other hand, resembles a conveyor belt. It operates on the presumption of guilt rather than innocence and starts from the belief that "the repression of criminal conduct is by far the most important function to

be performed by the criminal process".(18) In order to achieve this goal, "primary attention must be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime."(19) Thus, Packer points out that this model places a high premium on speed and finality.

Speed, in turn, depends on informality and uniformity; finality depends on minimizing the occasions for challenge. The process must not be cluttered with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court; it follows that extra-judicial processes should be preferred to judicial processes, informal to formal operations. Informality is not enough; there must also be uniformity. Routine stereotyped procedures are essential if large numbers are being handled. The model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model. The image that comes to mind is an assembly line or conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and

who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for reality, a closed file.

H.Packer Two Models of the Criminal Process p.11

Packer concludes his article by asserting that although the criminal process in the U.S.A. is based on a Crime Control Model it is moving towards a Due Process Model. Those British researchers who have utilised Packer's ideas have generally arrived at the opposite conclusion about the English system - i.e. that the rules of due process are being undermined by bureaucratic, crime control considerations. By describing the various informal practices that are routinely adopted in police stations and courtrooms and pointing to the bureaucratic motives which underly them, these authors invariably create the impression that, in doing this, court personnel are deviating from due process.

The basic problem with this kind of astructural and ahistorical analysis is that it simply asserts the belief that the English legal system is based on due process. This is true

even for the most sophisticated of these authors. For example, in their concluding chapter, Bottoms and McLean discuss Packer's article and suggest that the early stages of the criminal process - i.e. those controlled by the police - fit with the Crime Control Model. However, in order to explain the later stages they introduce a third model - the Liberal Bureaucratic Model. This model rejects the view that repression of criminal conduct is the most important function of the criminal process, but it also suggests that the formal adjudicative processes must have a limit. In other words, this third model involves a compromise between the obstacle course of the Due Process Model and a recognition of the necessity of dealing quickly with cases in the lower courts. The introduction of this third model is an interesting innovation in that it highlights the subtle differences between police and magistrates' courts, but it does not avoid the common trap of reifying the Due Process Model. Bottoms and McLean's use of the Liberal Bureaucratic Model still involves the implicit assumption, inherent in virtually all observational studies, that the English legal system is based on due process.

Towards A Structural Analysis Of Magistrates' Courts

The astructural bias of interactionist studies and their tendency to overstress the autonomy of court personnel has also been noted by Doreen McBarnet. Like us, she acknowledges the fact that the "microsociological side of the coin is both valid and important" but she correctly stresses that "it is not the only one."

There is a tendency to present formal rules and actual behaviour as mutually exclusive, but reality is never quite so simple. Just because people do not act out their roles to the letter, may 'make' rather than 'take' them, it does not follow that they do not act them out at all. One does not need to fall into naive role theory where 'ought' and 'is' are assimilated to recognise that people are constrained in socially - and legally - defined situations. The judge observed summing up:

"I have no alternative but to find you guilty as charged."

or even more poignantly:

"With great regret I must find this case not proven."

is not merely exhibiting Sartre's 'mauvais foi' but reminding us that if he is no norm-following homonculus, neither is he a free agent in the court.

D. McBarnet Pre-Trial Procedures and the Construction of Conviction pp.176-177

In her work McBarnet has documented these links between the formal rules and actual behaviour. Thus, she shows how the formal law militates against pleas of not guilty. She notes that a plea of not guilty can present practical problems for the defendant (eg., loss of earnings, arranging time off work whilst not wishing the employer to discover the real reason for one's absence). Defendants who manage to overcome these problems are not eligible for compensation if they are subsequently found not guilty. "On the contrary, there is provision in England, though it is rarely exercised, for the costs of the prosecution to be awarded against a defendant who is found guilty after pleading not guilty and wasting the courts time." (20) She also points out that, whereas the prosecutor can accept the change to a guilty plea at any time without explanation, there are structural obstacles to altering a

guilty plea to one of not guilty. This is only allowed at the discretion of the court if an adequate case is made by the accused.(21)

Thus, McBarnet is able to show that the actions of police officers and solicitors in encouraging defendants to plead guilty are not a straightforward deviation from the due process of law. The formal law itself places the defendant under pressure to plead guilty. McBarnet goes on to show that a similar situation exists when it comes to the presentation of the case. The mere fact that the accused is defending against, rather than instigating, the charge means that the defence has to be constructed within the framework of relevant issues (in both common sense and legal terms) set up by the charge.(22) The prosecution are empowered to alter the charge before the trial which means that the defendant may arrive in court without knowing either the charge or the case against him/her. However, McBarnet points out that the same rules do not apply to the defence case which is governed by the doctrine of 'no surprise'. This is particularly true in the

case of special defences (eg., alibis, self-defence, insanity, and, incrimination of a specific person) when the prosecutor must be given prior notice.(23) The fact that the prosecution is backed by the resources of the state also means that the prosecution has an advantage in the collection of evidence. Although there is some exchange of evidence, the defence does not have a right of access to prosecution evidence and, as a result: "Information is thus filtered into as unambiguous account as possible, and points that raise doubts, useful to the accused but available only to the police may never come to light."(24)

Because of these structural factors, McBarnet suggests that "even with the best of lawyers and unlimited funds the accused could not stand in the same position as the crown."(25) Nevertheless, as she shows elsewhere, the ability to afford good legal representation can make a difference. Lawyers and solicitors are trained in the techniques of cross-examination whereas the vast majority of defendants are ignorant of the niceties of courtroom procedure. This technical competence

combined with the fact that magistrates are likely to show more respect towards their professional status(26) means that solicitors or barristers are likely to be more effective in the presentation of a case. However, legal representation is still the exception in magistrates' courts and thus, not even this limited degree of protection is afforded to the majority of defendants.

The fact that so few people have legal representation in magistrates' courts has frequently been explained in terms of magisterial discretion in the allocation of legal aid.

However, as McBarnet points out:

This is not just the product of magisterial discretion - as suggested by those who note that applications are decided on by magistrates and concentrate on the variations between them. Selective criteria are set down by the Home Office in a circular of 1972 (No.237) which stated that legal aid should be provided according to the likelihood of the defendant being sentenced to imprisonment. This means that legal aid is more likely to be awarded in the higher courts where the scale of punishments is more severe. What this

ignores though, is that previous convictions have a cumulative effect that increases the likelihood of imprisonment even on summary offences, so that it is important even by the criteria laid down for even first offenders on petty charges to be represented.

D. McBarnet Pre-Trial Procedures and the Construction of Conviction p.188

This tendency of the formal law to deny legal aid to defendants in magistrates' courts is no accident. The Widgery Committee on legal aid insisted that a professional lawyer was necessary in the higher courts on the grounds that:

A layman, however competent, can rarely be relied on to possess the skill and knowledge necessary to put forward the defence effectively tried on indictment without the guidance of a lawyer.

The Widgery Committee, 1966, p.79 Quoted in D. McBarnet Conviction p.125

The same Committee denied that a professional lawyer was normally necessary in the lower courts "implying that points of law, tracing and interviewing witnesses, or engaging in expert cross-examination were not normally involved." (27) Such

a distinction could only be valid if the rules of procedure were essentially different, but this is not the case.

The trial, and with it the method of proof and the criteria of proof, remain exactly the same. There is the same adversarial structure, the same structure of proof by examination, cross-examination, the same requirement of direct witnesses to provide that proof, the same rules of evidence, and the same requirement that the procedures be rigidly adhered to. These are not layman's courts but highly legalised proceedings.

D. McBarnet Conviction p.125

Thus, the failure to provide legal representation in the magistrates' courts does not result purely from the exercise of discretion, nor does it reflect procedural differences between these courts and the higher courts. Rather, it reflects a clear legal policy to maintain the particular form of 'justice' that is administered by magistrates courts.

Although we have concentrated on the lack of legal representation, McBarnet cites a number of further examples to show how the formal law reinforces the informal practices that have

been identified by observational studies. The importance of her work on magistrates' courts is twofold. Firstly, she provides a thoroughgoing critique of interactionist studies by showing that their assumptions about the nature of the formal law are based upon a mistaken presumption of due process. She shows that the distinction that is invariably made between due process and crime control is a false dichotomy.

Actually examining the rules of due process in statutes and precedents indicates that they are not dichotomies at all. Judges and politicians may deal in the rhetoric of civil rights and due process, but the actual rules they create for law enforcement and the policies they adopt on sanctioning police malpractices are less about civil rights than about smoothing the path to conviction, less about due process than post-hoc acceptance of police activities as justifying themselves. Thus a good many of the practices in criminal justice described as informal perversions of the formal rules are in fact allowed, facilitated or upheld in the formal rules of statute and precedent.

... In short the dichotomies organising criminal justice research are false. The operation of the law is not a subversion of the substance of the law but

exactly what one would expect it to produce; the law in action is only too close a parallel to the law in the books; due process is for crime control.

D. McBarnet False Dichotomies In Criminal Justice Research pp.30-31

Secondly, she highlights the fact that the English legal system is composed of two distinct tiers which take significantly different forms.

One, the higher courts, is for public consumption, the arena where the ideology of justice is put on display. The other, the lower courts, deliberately structured in defiance of justice, is concerned less with subtle ideological messages than with direct control. The latter is closeted from the public eye by the ideology of triviality, so the higher courts alone feed into the public image of what the law does and how it operates. But the higher courts deal with only 2 per cent of the cases that pass through the criminal courts. Almost all criminal law is acted out in the lower courts without traditional due process. But of course what happens in the lower courts is not only trivial, it is not really law. So the position is turned on its head. The 98 per cent becomes the exception to the rule of 'real law' and the working of the law comes to be typified not by

its routine nature, but by its atypical, indeed exceptional, High Court form. Between them the ideologies of triviality and legal irrelevance accomplish the remarkable feats of defining 98 per cent of court cases not only as exceptions to the rule of due process, but also of no public interest whatsoever. The traditional ideology of justice can thus survive the contradiction that the summary courts blatantly ignore it every day and that they were set up for precisely this purpose.

D. McBarnet Conviction p.153 (my emphasis)

McBarnet's achievement has been to show us that the English legal system has been constructed in a way that has deliberately created lower courts designed for speed and 'efficiency' without regard to the spirit of legality. However, her work leaves unanswered the question of why magistrates' courts have taken this particular form. McBarnet raises this question when concluding an early article. She says:

The gap between rhetoric and reality is not just one between formal equality and situational inequality, between the law in the books and the law in action,

but a gap between the rhetoric of justice and the reality of criminal procedure: it is a gap within the law in the books, which has to be traced not to the petty administrators of the law but to the people with the power to make it - the judicial and the political elite of the state. In this way criminal procedure provides a direct entree into the politics of law.

D. McBarnet Pre-Trial Procedures and the Construction of Conviction p.199 (original emphasis)

In this passage McBarnet recognises the importance of understanding the judicial policy making process that has created the modern form of the magistrates' court but her thoughts on this issue are extremely vague. In concluding a later article on the police, she clarifies her position a little:

If the contradictions between rhetoric and practice in law enforcement cannot simply be explained away as the unintended consequences of petty officials, then we are faced with the contradictions within the core of the state between the ideology and the structure of the law. ... Probing how and why notions like legality and justice are constructed currently and historically provides a case study in

the wider issue of the sources and mechanics of dominant ideology.

D. McBarnet The Police and the State p.213

Here again McBarnet recognises the importance of the question of why magistrates' courts have taken their particular form but her thoughts are still not clearly formulated. McBarnet returns to this theme again in concluding her 'False Dichotomies' article where she says:

But bringing the law in as an explanatory factor in the operation of criminal justice is not enough. We must examine the assumptions and purposes underlying criminal justice itself in terms of its social, historical and political basis, in relation to class, power, interests and ideologies; in short, we must apply the questions and concepts hitherto reserved for the analysis of specific laws to the legal system per se.

D. McBarnet False Dichotomies in Criminal Justice Research p.31

This is her clearest statement of the importance of developing an analysis of why magistrates' courts have taken their

particular form but, as in here other articles, it is only raised in the form of a conclusion. She tells us where to look for an answer to this question - i.e., in the historical development of the magistracy - but she has not addressed herself to it in any systematic way. In her book she does include a four page history of summary jurisdiction but this is not sufficient to adequately outline the development of magistrates' courts as a court of summary justice let alone analyse this phenomenon. If we are to understand why the magistrates' court has evolved as the second tier of the legal system dealing with the vast bulk of criminal cases in a manner which compromises the spirit of legality to allow for an administratively efficient means of crime control, we must analyse the transformation of the magistracy that took place in the mid-19th in much more detail. McBarnet has demonstrated that the nature of magistrates' justice is a product of the structure of the legal system rather than merely resulting from the actions of court personnel, but to answer the question of why this is the case, we have to examine the 19th origins of the modern form of the English magistracy.

Summary

In this chapter we have seen that observational studies have been able to gather information on more than just sentencing decisions and that they have exposed some important features of the nature of magistrates' justice such as: the speed of trials, the high number of guilty pleas and the general coercive nature of the magistrates' court. However, although they have been able to describe the ways in which legal proceedings within the magistrates' court diverge from the spirit of legality, the fact that they have contained themselves within the courtroom has led them to explain the inequalities that they have observed as 'irregularities' or deviations from what they have supposed to be the true nature of British justice. We have seen, through our examination of McBarnet's work, that this dichotomy between formal equality and situational inequality is, in fact, false and that the procedural rules that govern the administration of proceedings in magistrates' courts actually reinforce many of the 'irregularities' that have been assumed to result from the

exercise of discretion by court personnel.

However, although she raises the question many times, McBarnet has not explained why magistrates' courts have taken the form of crime control rather than due process. This is the historical question that lies at the centre of this thesis but, before we embark upon our survey of the development of the English magistracy, we will first consider, in the following chapter, some of the historical approaches that might inform our analysis.

CHAPTER THREE

METHODOLOGICAL ISSUES IN THE HISTORICAL ANALYSIS

OF THE ENGLISH MAGISTRACY

Conventional Histories Of The English Magistracy

A number of histories of the magistracy have already been published and it may be asked "why do we need another?" The answer to this question lies in the nature of these histories. Almost without exception, these conventional histories have confined themselves to a description of the development of the magistracy. Thus, although we have drawn upon the information that such studies have generated, they do not directly address the question of why magistrates' courts have emerged in their particular form. Indeed, they have not questioned the nature of justice administered in magistrates' courts, but have simply taken it for granted that they conform to the principles of due process. This assumption appears to be so deeply ingrained in their work that it is rarely made explicit but it can be seen in the following passage from Bertram

Jurisdiction Act. He says:

One of the most noteworthy results secured by the co-ordinated, simplified and more orderly proceedings of the Justices, was to make possible the tremendous expansion of summary jurisdiction which developed during the nineteenth century, and still continues. In a recent year, out of a total of over 800,000 convictions for the whole country all but 21,000 were dealt with in Petty Sessions. It is fair to say that this astonishing achievement, could hardly have been accomplished but for the outstanding efforts of the architects of the 1848 legislation. Perhaps they builded better than they knew.

B. Osborne Justices Of The Peace 1361-1848
pp.227-228 (my emphasis)

In this passage what emerges is simply an admiration of this legislation and the fact that it enabled magistrates' courts to make the transition to courts of summary jurisdiction. There are no questions raised about the nature of the summary justice that is administered in magistrates' courts and we must assume, from the general tone, that Osborne does not see

this as problematic. Neither he, nor any of the other conventional histories of the English magistracy question the nature of summary jurisdiction in magistrates' courts. Given that this is the case, we should not expect them to offer an answer to the question of why magistrates' courts have taken their particular form. In fact, these histories are little more than teleological accounts and they provide no analysis at all of the development of magistrates' courts. Not only do they assume that magistrates' courts operate on the basis of due process, but often implicit behind their apparently neutral description is an assumption that these courts are part of a legal system which represents a high point of "civilisation". This idealised view of the English legal system is then taken as a benchmark with which to assess all previous stages in the history of the magistracy. Each development is thus portrayed as an inevitable step towards the end product - as society reaches a higher stage of 'civilisation' so magistrates' courts and other parts of the legal system are 'reformed' to reflect this 'progress' until we reach the present in which the modern magistrates' court is assumed to be as close as

possible to perfection. Again, Osborne's discussion of the 1848 Summary Jurisdiction Act will serve as an example. Having outlined the details of the legislation, he says:

It is not possible to exaggerate the importance and significance of the legislation of 1848. Its passage into law was a stupendous achievement. No longer was it necessary for Justices and those who appeared before them to try to find their way through the by-ways and by-lanes of centuries' old statutes and judicial decisions, criss-crossing each other in a most bewildering manner, often well-nigh impassable in the mass of undergrowth that obscured them. They were now declared unfit for further traffic, sealed off under the closing order imposed by the new legislation. To take their place there was now a great highway, constructed with much labour and considerable ingenuity, mainly from material salvaged from the old pathways and passages, along which traffic was able to move with a speed and regularity never before attainable.

Monumental as was the great engineering structure built in 1848, it was by no means complete; the limitations imposed by the use of material from its discarded predecessors meant that many desirable changes were deferred. The public notification of the dates of meetings and the prohibition of

sittings of Justices other than in prescribed buildings - these are two examples of amendments effected by legislation of later years. But these and other changes serve only to emphasise the achievement of the builders of the remarkable construction that took shape a little more than a century ago.

B. Osborne Justices Of The Peace 1361-1848
pp.226-227

We can see in this passage the way that Osborne interprets the legislation passed in 1848 from a standpoint which takes the modern magistracy for granted. It does not occur to him to ask why these changes were implemented. The answer to such a question appears to him to be 'obvious' - to clear up the confusion created by the mass of old statutes. Instead, he focusses on the achievements of the individuals who drafted the legislation. This is a fairly typical example of the teleological nature of the conventional histories, not only of the magistracy but of the legal system in general. They accept unquestioningly that the British legal system and its constituent parts serve the interests of society as a whole in the

best way possible. This obviates the need to explain why it has arisen in its particular form and they have been content, instead, to document how it occurred by describing in detail the sequence of legislative and policy changes leading to the creation of the modern system.

The aim of this thesis is to analyse the processes that produced the English magistracy in its modern form. Our argument will be that the form taken by the modern magistrates' court is inextricably linked with the emergence of industrial capitalism and the particular class structure of nineteenth century England. However, before turning to this historical analysis, it is necessary to discuss some of the methodological issues involved in such a project.

Research method

The major concern of this thesis is with the transformation that occurred in the nineteenth century but, in order to understand this more fully, I have also included a sketch of the earlier history of the English magistracy. These two parts

are not of equal importance and I have, therefore approached them in different ways.

The examination of the early history of the magistracy has been included both to provide an understanding of the development of the gentry as an agrarian capitalist class and to trace the significance of the institution of the magistracy as an element of their power base. This helps provide the context in which the C19th conflicts over the functions of the magistracy occurred but it is not of central importance to this thesis. Partly for this reason but also because of the immense time-span involved - six or seven centuries elapsed between the inception of the magistracy and its transformation in the nineteenth century (1) - I have had to rely on secondary sources. As a consequence, the arguments contained in Chapters Four and Five are more tentative than those in the later chapters but the existing historical research appears to have adequately demonstrated the major features to which I wish to draw attention.

The study of the changes that occurred during the nineteenth

century posed more difficult methodological problems. There is existing material on county government, policing and, to a lesser extent, magistrates' legal function which I have been able to draw upon. However, it has largely been addressed to different questions without a central focus on the functions of the magistracy and it was therefore necessary to turn to primary sources.

Social historians concerned with law and order issues have produced some useful work based upon historical sources such as court records, Home Office correspondence, newspaper reports, military despatches, etc.(2) To have conducted research of this kind would have been beyond the competence of what is essentially a sociological study. Moreover, it would not have provided the kind of evidence required for this thesis. The historians' work has been valuable in providing information on the way in which magistrates carried out their legal and policing functions but, by its very nature, it has taken these functions for granted. This is not intended as a criticism. The point is simply that we are concerned with

different questions which require a different kind of evidence. The transformation of the English magistracy took place, not at the local level within the courtroom or on the street controlling crowds (although it had implications for both) but, in the Houses of Parliament through legislation. For this reason, the choice to concentrate on the material contained within the nineteenth century Parliamentary Debates (together with related Bills, Acts, Commissions, etc. and the published work of some influential "reformers" such as Fielding, Colquhoun, Chadwick and Eardley Wilmot) (3) appeared to be a fairly obvious one.

However, that is not to say that it has been without its difficulties. Firstly, there is the problem of "selectivity". Although we have looked at over 300 volumes of Parliamentary Debates containing a mass of material, only a small part of it is referred to in the following chapters. There are two problems here: How does the reader know that I have selected the appropriate debates?, and; How does he or she know that I have identified the most significant extracts from speeches?

The answer to both of these questions is, of course, that the reader cannot know for certain without repeating the study. However, this is true of most social science research and, in this respect, the choice of the Parliamentary Debates has the advantage of allowing for the possibility of future researchers conducting similar research projects to test the interpretation of the material offered in this thesis.

A second set of difficulties, which impose more serious limitations, arise from the fact that the Parliamentary Debates only provide information about what occurred within the parliamentary arena. Again, there are two clearly identifiable problems here. Firstly, it has meant that I have only been able to identify the discourse of the gentry and the bourgeoisie. The working class, who for the vast majority of the period with which we are concerned had no parliamentary voice, appear largely as the objects of repression rather than as the subjects of history. As a result this thesis runs the risk of creating the impression - so trenchantly criticised by E.P. Thompson - that the working class have no place in the

process of history (4). However, this is not necessarily the case. The process through which the modern magistracy emerged took place within parliament and it was not, therefore, directly influenced by the working class but this does not mean that it was not indirectly influenced by working class protest.(5) Nor does it deny an important role for the working class in the reaction to legislative change.(6)

Secondly, it is clear from reading the Parliamentary Debates that, at certain points, decisions were taken 'behind the scenes'. A good example of this occurred when Sclater-Booth withdrew his County Government Bill (1878) and replaced it with the less radical County Boards Bill (1879). In introducing the latter, he said that he had been influenced by communications from magistrates who were opposed to the proposed fusion of county boards and quarter sessions.(7) In this instance, and others, the Parliamentary Debates provide an indication of what occurred in the extra-parliamentary arena but it also raises the logical possibility (or, indeed, probability) that other such decisions were taken which are

not manifest in the Parliamentary Debates. The failure to take account of them imposes a limitation on the arguments that are presented in later chapters but the nature of such decisions makes their systematic study very difficult. They are likely only to be revealed piecemeal by other historical investigations and we can only await the outcome of such research to see if it seriously invalidates my analysis. All that can be said at present is that, on most of the issues with which I am concerned, there appears to have been a full discussion within the Parliamentary Debates and there is no reason to suppose that this will be the case.

A third set of problems concerns the limitations of the material contained within the Parliamentary Debates themselves. There were occasions, notably the 1848 Summary Jurisdiction Act, when proposed legislation elicited little or no discussion.(8) If this had been the normal pattern, then this research project would have been impossible. However, it was not and the majority of measures, particularly those which were passed into law, were debated a good deal more fully. The

major arguments for and against the changes that we discuss recur throughout the Parliamentary Debates and in this context, the lack of discussion on any specific proposal becomes, in itself, an object of research. Thus, although my interpretation of these issues is a little more speculative, I have nevertheless been able to offer an explanation of them in terms of the wider discourse contained within the Parliamentary Debates.

A second problem resulting from the inherent limitations of the Parliamentary Debates concerns the attribution of meaning to statements made in Parliament: How do we know that when politicians say that they are supporting or opposing a measure for a particular reason that this is, in fact, their true reason? It may be that monetary interests are concealed, or that debates are dominated by concerns about immediate events and the deeper issues therefore fail to surface, or it may be that an advocate of a particular position chooses to couch his arguments in terms that he believes will be most likely to influence his colleagues. For all of these reasons, and more,

we cannot assume that parliamentary speeches necessarily reflect the contributors' true motives.

It is important to point out here that, even without knowing the "true" motives of the speakers, statements made in the Parliamentary Debates may take on a significance of their own in terms of their ideological content. We will see later in this chapter that the conflict of ideals was an important dimension to the struggle between the bourgeoisie and the gentry in 19th England. By analysing what was actually said in support of, or in opposition to, the various proposals it is possible to assess the growth or decline in the significance of particular ideological positions and to comment upon the changing nature of the discourse of reform. Nevertheless, the problem of attributing meaning remains. If I had set out to produce a body of absolute knowledge then this would present insurmountable difficulties to my project, but this has not been my intention. That is not to say that my version is therefore arbitrary. What I am offering is an interpretation of a particular historical process, whereby the signif-

icance that I attach to particular speeches is supported by cross-referencing to other debates, Parliamentary Reports, published contributions from outside parliament and, previously published historical research. Thus, although I have attributed motives to the participants and imposed meanings upon the debates, the rigour of the research upon which my interpretation is based is testable.

There is also a second sense in which my version of events is not arbitrary. As with any historical or sociological study, the researcher brings with him or her a conceptual framework which structures their interpretation of the evidence. It is incumbent upon us to attempt to clarify our key concepts at the outset so that they too can be subjected to scrutiny. The central argument of this thesis is that the form taken by the modern magistracy was a product of the particular social formation of nineteenth century English capitalism. In the following section, therefore, I will outline at some length the class concepts that underpin the discussion in subsequent chapters.

The Concept Of Class

If the term class had an unambiguous meaning I could simply reproduce it here and the reader would then understand what is meant when I say that I am offering a class analysis of the emergence of the modern magistracy. Unfortunately, this is not the case. The concept of class has been used in many varied ways within sociological analysis and research and I must, therefore, attempt to clarify both my use of "class" as an analytical concept and my understanding of the particular "class formation" of nineteenth century England.

As a starting point I can say that I am using class in the Marxist sense of conflicting groups defined in terms of the ownership of the means of production. However, in view of the many different interpretations of Marx's work, this statement is far from adequate. In any case, my use of class concepts is not dogmatic and it can best be unravelled through a critical discussion of the ways in which it has been used by others.

An increasingly popular use of class which can be quickly dismissed is that embodied in the Registrar General's Classif-

ication which divides occupations into six or seven bands according to their perceived social status. Although this has been utilised by some sociological research to produce useful empirical evidence of inequalities in life chances in employment, education, income, health, etc., this has been at the expense of an impoverished conceptualisation of class. Insofar as these studies employ a concept of class at all it is reduced to the social status of occupations. Even this is unclear because no criteria are offered to explain why there should be six or seven categories rather than any other number. In practice, class ceases to be an analytical tool and becomes, instead, an empirical category - an operationalised "variable" - to be measured.

A more sophisticated usage of class can be found in the Weberian sociological tradition. Max Weber's views on the concept of class, like much of the rest of his work, are underpinned by a rejection of the crude economic determinism of the Second International. The primary thrust of his argument is that economic position does not automatically trans-

late into political power. Hence the linkage of his analysis of class to the possibility of power being based upon status groupings or political parties.(9) However, his anti-determinism and rejection of a base/superstructure model also profoundly influenced his formulation of the concept of class. He wishes to retain the idea of class as an economic category but he does this by positing a separation of the social and economic orders and narrowly defining the latter in terms of consumption as "the way in which economic goods and services are distributed and used." (10) For Weber, a person's 'class situation' is determined by their market position which he defines as the ownership or non-ownership of 'property'. This is subdivided into the legal ownership of property and, services that can be offered in the market. On this basis, Weber argues that capitalist societies are composed of three broad classes: the dominant entrepreneurial and propertied groups; the middle class, consisting of petty bourgeois, propertyless white collar workers, technicians and intelligentsia, and; the manual working class.

The major strengths of the Weberian position are that it gives some purchase on the nature of power and conflict and that class retains its purpose as a conceptual tool for the analysis of capitalist society. However, although Weber is surely correct to reject crude economic determinism, his formulation of the concept of class represents an unnecessary over-reaction which loses some of the advantages of Marx's original analysis. Superficially, Weber's model may appear to be essentially similar to that offered by Marx, with the simple addition of a middle class to reflect changes in the occupational structure since the time of Marx's writing. However, this appearance masks a fundamental difference in the way that the two men conceive of the class structure in capitalist society. Marx's model is inherently dynamic in that it portrays classes as mutually dependent based upon exploitative production relations and characterised by conflict. By equating 'class situation' with 'market situation' (11), Weber loses this dynamic quality and presents us, instead, with a static model of the class structure in which classes exist but not in direct relation to each other. Thus, although Weber

attempts to retain the notion of class struggle, it can have little meaning within his model since he offers no analysis of the material basis of such conflict.

It is because Weber's analysis portrays an intrinsically static view of class that I wish to reject it in favour of a Marxist usage. Nevertheless, Weber's work points to a number of important issues involved in the use of the concept of class which require further discussion. Within contemporary sociological analysis attention has focussed on the question of where to draw the boundary between the working class and the middle class.(12) However, since these debates are primarily concerned with the analysis of class structures in the later C20th, I will not follow them here.(13) For present purposes it is more important to explore further the issues with which Weber began concerning the relationship between the economic and social orders. I have already expressed my lack of sympathy with crude versions of economic determinism. Now I want to attempt to clarify my position on the relationship between the economic and the political, objective and

subjective dimensions of class, etc.. To do this, I will turn to recent debates amongst historians which have been addressed to precisely these issues.

The central figure in the historians' debates is E.P. Thompson. His starting point is similar to Weber's in that he rejects those conceptions of class which portray class consciousness and class struggle as inevitably determined by the economic base of society. However, whereas Weber rejected a Marxist framework and attempted to formulate an alternative conception of the class structure of capitalism, Thompson offers a "Marxist" analysis of the subjective dimension of class. He argues that class is essentially an historical concept in the sense that it is concerned with social processes that occur over time in a largely unpredictable manner. It is for this reason that he attacks theoretical models "that are supposed to give us objective determinants of class".(14) This led him to make the following statement in his Preface to 'The Making Of The English Working Class':

I do not see class as a 'structure', nor even as a 'category', but as something which in fact happens (and can be shown to have happened) in human relationships.

E.P. Thompson The Making Of The English Working Class p.9

His objections to structural analyses of class are more fully elaborated in his later critique of Althusserian Marxism when he says:

It is the misfortune of Marxist historians (it is certainly their misfortune today) that certain of their concepts are common currency in a wider intellectual universe, are adopted in other disciplines, which impose their own logic upon them and reduce them to static, a-historical categories. No historical category has been more misunderstood, tormented, transfixed, and de-historicised than the category of social class; a self-defining historical formation, which men and women make out of their own experience of struggle, has been reduced to a static category, or an effect of an ulterior structure, of which men are not the makers but the vectors.

E.P. Thompson The Poverty Of Theory p.238

Allied to this attack on "unhistorical theory-mongering" (15), is his passionate abhorance of historical determinism and his insistence upon the peculiarities of the historical development of specific social formations.

[For] historical explanation discloses not how history must have eventuated but why it eventuated in this way and not in other ways; that process is not arbitrary but has its own regularity and rationality; that certain kinds of event (political, economic, cultural) have been related, not in any way one likes, but in particular ways and within determinate fields of possibility; that certain social formations are - not governed by "law" nor are they "effects" of a static structural theorem - but are characterised by determinate relations and by a particular logic of process.

E.P. Thompson The Poverty Of Theory p.242
(original emphasis)

I, too, would want to reject models which portray class in purely static terms or which suggest an inevitable unravelling of historical processes. I am also mindful

of Thompson's reminder of the dangers of abstract theorising which loses sight of the importance of concrete class struggles. Nevertheless, I cannot fully accept the alternative offered by Thompson because he is not, in fact, rejecting particular models but all attempts to provide a theoretical model of the class structure of capitalist society. He professes to offer a dialectical view in which classes are both made and make themselves. However, if we look more closely at what he is saying, we see that he only offers an analysis of the latter whilst completely ignoring the former. To misappropriate one of his own terms, what he offers is 'class struggle without class'.(16) This can be seen most clearly in his polemic against Althusser which constitutes the most thorough formulation of his position.

Class formations (I have argued) arise at the intersection of determination and self-activity: the working class "made itself as much as it was made." We cannot put "class" here and "class consciousness" there, as two separate entities, the one sequential upon the other, since both must be taken

together - the experience of determination, and the "handling" of this in conscious ways. Nor can we deduce class from a static "section" (since it is a becoming over time), nor as a function of the mode of production, since class formations and class consciousness (while subject to determinate pressures) eventuate in an open-ended process of relationship - of struggle with other classes - over time.

E.P. Thompson The Poverty Of Theory p.298
(original emphasis)

Here Thompson starts by stressing the dialectical nature of class formation but his elaboration reveals the way in which he reduces class to its subjective dimension of experience and consciousness.

What is missing of course are the determinant conditions on which Marx was equally explicit, and which set limits to what is possible for any group of men or women to do, which constitute them indeed as social beings.

R. Johnson Edward Thompson, Eugene Genovese and Socialist-Humanist History p.92

By equating class with "the experience of determination", Thompson fails to grasp the nettle of the objective determination of class and, thus, succeeds in replacing the "fleshless skeletons" offered by Althusser with a "boneless alternative".(17) In concluding the section on class in 'Eighteenth Century English society', Thompson writes:

I hope that nothing I have written above has given rise to the notion that I suppose that the formation of class is independent of objective determinations, that class can be defined simply as a cultural formation, etc. This has, I hope, been disproved by my own historical practice, as well as in the practice of other historians.

E.P. Thompson Eighteenth Century English Society:
Class Struggle Without Class? p.149

However, although Thompson's historical practice does demonstrate a sensitivity to the objective dimension of class, his failure to incorporate it into his theoretical contributions has meant that he effectively "abandons the possibility of understanding experience and

culture as class experience and culture".(18)

My usage of the concept of class attempts to reassert its complex dialectical nature. It has both an objective dimension in terms of the material position of groups in relation to the means of production and a subjective dimension in experience and consciousness. It also has both an abstract meaning as part of the analysis of the capitalist mode of production and, a more concrete meaning as a tool for describing particular social formations. I accept that the objective existence of class is a determinant of the concrete historical processes of class formation, class consciousness and class struggle but I would follow Richard Johnson in insisting that determination is not the same as determinism.(19) Thus to accept the objective existence of class does not, as Thompson implies, involve assumptions about the ways in which individuals and groups will necessarily act in particular situations or about the inevitability of the nature of the political, administrative and legal forms

that will emerge from any particular social formation. The implication of this position is that the relationship between the capitalist mode of production and the nature of any specific class formation cannot be established on an a priori basis. Therefore, I must also attempt to clarify the particularities of the class structure of C19th England.

The Class Structure of Nineteenth Century England

Although industrial capitalism was not entirely new in the C19th, the rapid expansion of this mode of production was the overarching feature of C19th England. The new factories, etc. embodied a different set of production relations which gave rise to the emergence of new classes - the bourgeoisie and the industrial working class. However, although industrial capitalism became the dominant mode of production by the second half of the C19th, we cannot merely assume that the bourgeoisie became the ruling class and that they were able to fashion a set of political and legal forms which unambiguously reflected their material interests. Firstly, existing

modes of production and the associated class structure did not simply disappear. The C19th was a period of transition in which industrial capitalism gradually became dominant and existing classes continued to play a significant role. Secondly, as we have seen in the previous section, the nature of the social formation of C19th England can not be predetermined by the relations of production. Rather, it was mediated by cultural traditions and the subjective experience of material conditions which, in turn, influenced the character of the class formation and the nature of the class struggle over political and legal forms. Thus, in order to understand this struggle, we must examine the nature of C19th class relations more closely.

Because the first half of the C19th was a transitional period, it is important to begin with a consideration of the social formation prior to the Industrial Revolution. Perkin has suggested that this was a 'classless society'.(20) However, he goes on to describe the way in which those who owned landed property monopolised the organs of state power and he

concludes by saying:

[But] the overriding pursuit of landed gentlemen was government. From the squire who was the unofficial arbiter of village affairs through the J.P. at Quarter Sessions and the M.P. in the Commons to the House of Lords and the Cabinet, government was the right, privilege and responsibility of the landed gentlemen who, besides being the only nationwide class in that otherwise classless society, were in the most literal sense the ruling class.

H. Perkin The Origins Of Modern English Society
1780-1880 p.56

The reference here to the existence of a 'ruling class' makes it difficult to tell what Perkin means by the term "classless society". The structure of his book, in which he later identifies the "birth of class" in the C19th, would suggest that he is pointing to the fact that the social formation of the C18th was different. If this is the case, then I would agree with him but this does not mean that C18th England was "classless". As Thompson reminds us, "In the eighteenth century agrarian capitalism came fully into its inherit-

ance" (21), and the class formation of 18th England was a product of this mode of production.(22)

Even a cursory acquaintance with the sources must dispel all doubts as to the fact that the 18th century gentry made up a superbly successful and self-confident capitalist class.

E.P. Thompson The Peculiarities Of The English
p.43

Thompson warns against the dangers of reducing political phenomena to their "real" class significance and points out that governing institutions operate with a good deal of autonomy. He goes on to say:

Analysis of the governing elite in England before 1832 must surely proceed at this level. The settlement of 1688 inaugurated a hundred years of social stasis, so far as overt class conflict or the maturation of class consciousness was concerned. The main beneficiaries were those vigorous agrarian capitalists, the gentry. But this does not mean that the governing institutions represented in an unqualified manner, the gentry as a "ruling class". At a local level (the magistracy) they did so in an

astonishingly naked manner. At a national level (desuetude of the old restrictions on marketing, the facilitation of enclosures, the expansion of empire) they furthered their interests. But at the same time a prolonged period of social stasis is commonly one in which ruling institutions degenerate, corruptions enter, channels of influence silt up, an elite entrenches itself in positions of power. A distance opened up between the majority of the middle and lesser gentry (and associated groups) and certain great magnates, privileged merchant capitalists, and their hangers-on, who manipulated the organs of the State in their own private interest. Nor was this a simple "class" tension between an aristocracy of great magnates and the lesser gentry. Certain magnates only were on the "inside", and the influence swung according to factional politics, the diplomacy of great family connections, control of boroughs, and the rest.

E.P. Thompson The Peculiarities Of The English
p.48

This analysis of 'Old Corruption', which has been praised by Thompson's critics (23), serves as an important reminder of the complexities of the social formation of C18th England. However, notwithstanding Thompson's qualifications, the C18th

can be described as a period of rule by the landed gentry the key characteristics of which are summarised in the following passage.

Patronage, however, was more than a device for filling jobs, fostering talent, and providing pensions for the deserving and undeserving. In the mesh of continuing loyalties of which appointments were the outward sign, patronage brings us close to the inner structure of the old society. Hierarchy inhered not so much in the fortuitous juxtaposition of degree above degree, rank upon rank, status over status, as in the permanent vertical links which, rather than the horizontal solidarities of class, bound society together. 'Vertical friendship', a durable two-way relationship between patrons and clients permeating the whole of society, was a social nexus peculiar to the old society, less formal and inescapable than feudal homage, more personal and comprehensive than the contractual, employment relationships of capitalist 'Cash Payment'. For those who lived within its embrace it was so much an integral part of the texture of life that they had no name for it save 'friendship'.

H. Perkin The Origins Of Modern English Society
1780-1880 p.49

I have cited this passage because it identifies those central features of gentry rule which are important for an understanding of the conflicts that occurred in the C19th. Firstly, it points to the significance of patronage whereby positions were filled on the basis of influence rather than ability. More importantly, it locates patronage within the social nexus of mutual dependence which bound together C18th English society. Perkin's formulation suffers from many of the weaknesses that Thompson has pointed to in the simplistic use of the concept of paternalism to describe C18th England.(24) Nevertheless the "vertical friendship" that Perkin identifies was an important feature of C18th England, if nothing else as a powerful ideology governing social relations.(25)

The fact that industrial capitalism emerged in England within the context of a social formation that was itself capitalist is of central importance in understanding the class structure of C19th England. This much is conceded by social historians taking conflicting positions in debates about the nature of the social formation of C19th England. In his seminal contrib-

ution, Perry Anderson states that:

Yet the condition of ... [the industrial bourgeoisie's] ... appearance in England was the prior existence of a class which was also capitalist in its mode of exploitation. There was from the start no fundamental, antagonistic contradiction between the old aristocracy and the new bourgeoisie. English capitalism embraced and included both. The most important single key to modern English history lies in this fact.

A period of intense political conflict between the nascent industrial bourgeoisie and the agrarian elite was, of course, inevitable once the manufacturers began to aspire towards political representation and power. But this clash was profoundly affected, and attenuated, by the context in which it occurred.

P. Anderson Origins Of The Present Crisis pp.
17-18

Thompson's critique does not challenge the basic propositions about the nature of the conflict between the gentry and the bourgeoisie. Thus, he says:

If the industrial bourgeoisie had been excluded from the political game in 1688 it was not because their property was industrial but because it was petty. As their property became more substantial they felt a corresponding accession of resentment; but this resentment was shared by many of their cousins (and sometimes literally cousins) in the country and the City. 1832 changed not one game for another but the rules of the game, restoring the flexibility of 1688 in a greatly altered class context. It provided a framework within which new and old bourgeois could adjust their conflicts of interest without resort to force. These conflicts, not only of direct interest but of outlook, style of life, religion were considerable; but so too were the attractive forces. We may set the conflict surrounding the Corn Laws on one side; but on the other (and simultaneously) we must set the existence of a common enemy, in Chartism, and the railway boom to which a parliament still overstocked with gentry gave tardy blessings and in the rewards of which the gentry shared.

E.P. Thompson The Peculiarities Of The English
p.50

In a similar vein, Johnson concludes his contribution to the debate by saying:

The legacy from a past that was at once agrarian and capitalist was undoubtedly very important. Throughout most of the nineteenth century there were not merely two sections of a ruling class (landed and bourgeois) but two co-existing modes of production, and two rather different kinds of social formation: agrarian and industrial capital, the former in relative decline but in a flourishing state until the last decades of the century.

R. Johnson The Peculiarities Of the English Route
p.25

Although they perceive it in different ways, all three of these contributors are pointing to the fact that the co-existence of agrarian and industrial capitalism had a profound effect on the character of the class structure of C19th England and the nature of the conflicts that ensued between the gentry and the bourgeoisie. Before going on to elaborate upon the significance of this, it is necessary to point out that the divisions between the gentry and the

bourgeoisie were not as clear cut as some parts of the above passages might imply. Throughout the C18th and C19th there was a continual process of "merger" between the gentry and the bourgeoisie. On the one hand, there was a tendency for manufacturers to convert into squires:

Whether to crown their success as 'eminent tradesmen' or to launch themselves and their families into the landed gentry, then, the entrepreneurs of the Industrial Revolution hastened to acquire land and build or buy a great house. In factory textiles Arkwright built Willesley Castle and became in 1787 the most flamboyant High Sheriff of Derbyshire and Nottinghamshire, while the Peels bought the Drayton Manor and Tamworth estates on which they raised their political careers. In the metal industries, the Foleys became barons, the Wortley's earls of Wharnccliffe, the Hardy's of Low Moor Earls of Cranbrook, the Guest's Lords Whimbourne, Isaac Wilkinson leased a country house at Plas Grono near Wrexham, his son John was buried at his seat at Castle Head, Ulverston, Matthew Boulton's son bought Great Tew from the Dashwoods, themselves descendants of a Restoration London brewer, Thomas Williams 'the cooper king' bought Plas Llanidan, Anglesey, from Lord Boston, and Michael Hughes, also of Parys Copper Mining

Company, rebuilt Sherdley Hall, near St. Helens. Wedgewood the great potter built Etruria Hall near his works and Barlaston Hall in the country. In brewing, a trade which had produced many new men before them, the 'power loom brewers' of the late eighteenth century built up large country estates: the Barclays in Norfolk, the Hanburys in Hertfordshire and Essex, the Whitbreads over £42,000's worth of land in Bedfordshire and Hertfordshire. In the paper industry the greatest paper-maker of the eighteenth century, James Whatman junior became High Sheriff of Kent at the age of twenty-six, and retired at fifty-three to his estate at Vinters, near Maidstone.

H. Perkin The Origins Of Modern English Society
1780-1880 p.88

On the other hand, the gentry were investing in industrial enterprises. This was particularly noticeable in railways and the extraction of minerals but Aydelotte's study of the business interests of the gentry in the mid-C19th suggests that the links between the gentry and business went much further. On the basis of his findings, he concludes that:

Many of the gentry, and many also related to the baronetage and peerage, who were clearly not businessmen had, nevertheless, important connexions with the business world.

W. Aydelotte The Business Interests of The Gentry
In The Parliament Of 1841-47 p.296

By the end of the C19th it is possible to talk about a "fusion" between big business and the large landowners resulting in a new hybrid capitalist class.(26) However, in the earlier period with which I am concerned, the process had not advanced this far and the important point for present purposes is to note the dynamic, transitory and complex nature of the class structure of C19th England.

With this in mind, we can now return to the nature of the struggle between the bourgeoisie and the gentry. Perkin suggests that this took place primarily at an ideological level.

The class which was most successful in this educational and moral struggle, in uniting its own members and imposing its ideals upon others, would

win the day and have most influence in determining the actual society in which all had to live and in approximating it more or less closely to its own ideal. The primary conflict in the newly born class society of the early nineteenth century was a struggle for the minds and hearts of men. It was a struggle between the ideals.

H. Perkin The Origins Of Modern English Society
1780-1880 p.220

Although I do not accept the implications of some of Perkin's statements suggesting that the struggle between the bourgeoisie and the gentry was purely ideological (27), his account does provide some valuable insights into the the development of the class identity of the English bourgeoisie and the nature of their conflict with the gentry. He begins from the observation that the old system of paternalism began to crumble during the Industrial Revolution.

As late as 1795 ... [the gentry] ... were still willing, in the form of Speenhamland, to pay the price of paternal protection in return for filial obedience. But from then onwards they began to exact the fruits of paternalism but refuse to pay the

price. As Baldwin has said of the twentieth century press lords, they claimed the privileges of the whore, power without responsibility.

H. Perkin The Origins Of Modern English Society
1780-1880 p.188

He goes on to argue that this provoked disillusion over the gentry's claim to be the 'virtual representatives' of the whole community.(28) In particular, "the provocative use of the landlords' political power to defend rent at the expense of profits and wages" in passing the 1815 Corn Law "opened the eyes of the middle ranks and turned them into a class."(29) Whereas the bourgeoisie had been content to petition as an old society interest group for the redress of grievances, it began to demand more radical changes in the political system.

Irresponsible use of aristocratic power, then, provoked the middle class into existence. Old society methods failed. Protest meetings and mass petitions - 54,000 signatures from Manchester, 24,000 from Leeds - failed to halt the Corn Law. The old society compact by which the landed interest ruled on behalf of the rest was therefore broken, and the middle class must assert its own power

through its representatives. The landed [sic] and commercial interests, demanded 'A Manchester Manufacturer' must be 'put on an equal footing in Parliament' through 'a better representation of commercial and artisan towns and districts.

H. Perkin The Origins Of Modern English Society
1780-1880 p.214

The disillusion with gentry rule created the climate in which the bourgeoisie became ready to listen to Benthamite intellectuals whose ideas helped to shape the 'entrepreneurial ideal'.(30) This ideal developed in direct opposition to what Perkin describes as the 'aristocratic ideal'. "By the light of capital, property meant idleness" and, similarly, "by the light of competition patronage meant corruption."(31)

[Thus] the entrepreneurial ideal confronted the aristocratic at every point. In politics it demanded the abolition of patronage and corruption by means of 'such a reform of the House of Commons as may render its votes the express image of the opinion of the middle orders of Britain'. In commerce it demanded the abolition of protection and monopoly as symbolized by the Corn Laws, and the completion of the system of free trade. In industrial relations it

demanded 'free trade in labour', the abolition of all State interference between employer and (adult) worker, including (be it noted) the Combination Acts, and the substitution of the contractual relations of employer and employed for the paternal relations of master and servant.

H. Perkin The Origins Of Modern English Society
1780-1880 p.228-229

Perkin's analysis of the birth of the 'middle class' could be improved by stressing its material basis in the growth of industrial capitalism which is important for an understanding of the conflict of interests resulting from the ownership of different kinds of property. Nevertheless the conflict of ideals that he identifies was central to the struggles over the form taken by the magistracy. Perkin's work is also helpful in that it helps us to understand the complexity of the political formations around these struggles.

Perhaps the most significant effect of the sublimation of the competition for income into a struggle between ideals was that it allowed men to embrace ideals other than that which sprang from their own source of income. ... Further, it helps to explain

one of the most puzzling phenomena of class conflict, the large proportion of leaders and spokesmen who led or spoke for classes other than their own. ...

Not that the leaders and spokesmen invented the ideals and imposed them on their followers. For one thing, they were at least as much chosen by the class as the class by them: they 'spoke to their condition', and when they did not were rejected.

H. Perkin The Origins Of Modern English Society
1780-1880 p.220-221

The preamble to this passage reveals Perkin's underlying assumption that class can be defined in terms of market situation (sources of income). It also reduces class struggle to an ideological conflict. Although I do not accept this theoretical position, the remainder of the passage is helpful in understanding the dynamics of C19th class politics. In the light of the earlier discussion of the overlapping material interests of the bourgeoisie and the gentry, I would want to remind Perkin of the complexity of "sources of income" and point out that the idea of men speaking for "classes other than their own" is, therefore, not as simple as he implies.

However, his basic point about the ability of individuals and groups to ally themselves to different ideological positions is important for an understanding of the complexity of the political formation of C19th England.

The final issue to consider in this discussion of the class structure of C19th England concerns the broad nature of the outcome of the struggle between the gentry and the bourgeoisie. I have already mentioned the fact that by the end of the century elements of the two groups had fused to form a new ruling class. Anderson has suggested that this resulted in a "unique paradox" whereby "the aristocracy became - and remained - the vanguard of the bourgeoisie." (32) This view has been attacked by Anderson's critics who have suggested that, although the 'aristocracy' continued to fill important positions, they pursued "identifiably bourgeois economic and social policies". (33) Perkin, from his rather different theoretical perspective, reaches a similar conclusion.

The landed class possessed a clear majority of the House of Commons until 1885, of the Cabinet until

1893, if not 1905, and the House of Lords until long after the Parliament Act of 1911 drastically reduced its powers. It effectively controlled recruitment to the Civil Service until at least 1870, to the army until 1871, to the Church for as long as it cared to exercise it. It dominated local government until at least 1888, and in some counties for much longer. Yet neither contemporaries nor historians have doubted that the capitalist middle class were the 'real' rulers of mid-Victorian England, in the sense that the laws which were passed and executed by landed Parliaments and Governments were increasingly those demanded by the business men and - which is not necessarily the same people - their intellectual mentors.

H. Perkin The Origins Of Modern English Society
1780-1880 p.271-272

Although I would concur in the rejection of Anderson's view that 19th England can be characterised as a period of 'aristocratic' rule, I would nevertheless be cautious about accepting any alternative interpretation which portrays the gentry as little more than puppets of the bourgeoisie. In fact, Perkin attempts to avoid this position in his continuation when he suggests that "the landowners had a veto on

matters affecting their own interest, which on occasions of head-on collision required the threat of revolution to remove." (34) However, this is still an over-simplification of the outcome of the struggle. Certainly, on those issues which directly concerned the functions of the magistracy, my reading of the Parliamentary Debates suggests that the emergent political and legal forms did not constitute either absolute victories for the bourgeoisie or total defeats for the gentry. Rather what emerged was a series of compromises reflecting, to varying degrees, bourgeois principles (the 'entrepreneurial ideal') whilst simultaneously incorporating elements of patronage and "paternalism". In chapters six, seven and eight we will trace the nature of these compromises in detail to show how the form of justice administered in modern magistrates' courts is a product of the class formation of C19th English capitalism.

Summary

This chapter has been concerned with the methodological issues involved in the historical analysis of the emergence of the

modern form of the English magistracy that follows in the main body of this thesis. Having outlined the inadequacy of the conventional histories of the magistracy for this purpose, I have discussed the merits of using the Parliamentary Debates as a primary source material for studying the changes that occurred during the C19th. This choice to use the the Parliamentary Debates was dictated by the nature of the issues to which this thesis is addressed. The changes in the function of the magistracy resulted from legislation and the Parliamentary Debates provide a rich source of material on the discourse of reform and the conflicts out of which the legislative changes emerged. However, there are also difficulties involved in the use of the Parliamentary Debates and I have pointed to some of the major problems in order to draw attention to the limitations of the analysis that is offered in this thesis. I have also attempted to clarify my usage of the concept of class and my perception of the class structure of C19th England which have structured my interpretation of the emergence of the modern magistracy.

Having thus identified the limitations imposed by the nature of the source material and clarified the key element of the underlying conceptual framework we can now embark upon our historical analysis of the English magistracy.

CHAPTER FOUR

THE ENGLISH MAGISTRACY FROM THE 12TH TO THE CIVIL WAR

Introduction

In this chapter, we will briefly examine the history of the magistracy from its origins in the Middle Ages to the Civil War. Although this period predates the historical moment when the modern magistracy was forged, we will be able to highlight the long connection between the gentry and the county magistracy which had a significant effect upon the nineteenth century developments.

The First Justices Of The Peace

There is considerable disagreement amongst conventional historians as to the precise origins of the Justices of the Peace. Beard has traced it back to the reign of Richard I when in 1195 Archbishop Hubert issued a proclamation which assigned knights to summon all men of 15 years or more to swear that they would not be robbers, outlaws or thieves and that they

would make pursuit when the hue and cry was raised.

The theory is advanced that this assignment of knights marks the origin of the conservator of the peace, and it is compatible with subsequent developments. Here is a distinct appointment of officers to take oaths for the preservation of the peace and to assist the sheriff in his police work - functions like those of the conservators before they received that fuller authority and dignity which made them justices of the peace.

C Beard The Office of Justice of the Peace in
England p.18

Beard shows that the precedent set by Hubert was followed by King John and that under Henry III knights were used in police and administrative work. Thus, in 1227 Geoffrey de Lucy and four others were appointed as justices for the examination of weirs in the Thames in Oxfordshire, Berkshire, Buckinghamshire, Middlesex and Surrey. They were given powers to punish offenders against the provisions for the maintainance of weirs. In 1230 knights, in conjunction with sheriffs, were assigned to take the assize of arms in the several counties,

and, in 1252 a Writ provided that the sheriff and two knights should compel all persons aged 15 or more in their county to take an oath saying that they would arm themselves according to the amount of their land and chattels.(1)

Beard's thesis has stimulated a debate amongst historians of the English magistracy. For example, Hazeltine was prepared to recognise the possibility that the history of J.P.s could be traced back to 1195 but he argued that there is no clear historical evidence to support this view.(2) Page follows Hazeltine in rejecting 1195 as the origin of the magistracy but goes on to say that something recognisable as the magistracy emerged in 1264 after the treaty between Henry III and the barons, when Simon de Montfort provided for Custodes Pacis - Keepers of the Peace - in each county.(3)

They were publicly and firmly to forbid homicide, incendiarism, robbery, extortion, bearing of arms without license, and to repress all other offences against the peace under pain of disinheritance and

peril of life and members.

C Beard The Office of Justice of the Peace in
England p.21

Osborne offers yet another starting point when he places the origin of the magistracy with an Act of 1327 which provided that 'In every county there shall be assigned good and lawful men to keep the peace'.(4)

Moir, in her account of this early period, points out that, even after the Act of 1327, the position of the Custodes was weak because, although they could initiate proceedings, they could not determine their own indictments and without this power they could not become an effective peace keeping force.(5) She shows that there was divided opinion about whether they ought to be turned into an effective peace keeping force and that the period immediately after 1327 was one of fluctuation in which these powers were successively granted and withdrawn. In 1327 Parliament had asked for Custodes to be granted powers of punishment. This request was refused but the powers that had been requested were granted in

1329, withdrawn again in 1330 and restored once more in 1332.(6) According to Moir, this situation of flux existed for about 30 years: "Some years saw their partial eclipse, others the restoration and extension of their authority."(7) This situation continued until 1361 when the Justices of the Peace Act gave J.P.s definite powers to determine the cases that they initiated.(8)

The Growth Of Magistrates' Powers - 1361 To 1640

However fascinating, this debate need not concern us unduly in our attempt to understand the development of the English magistracy. The very fact that the conventional historians can not agree about the precise origin and the fact that several measures have been advanced as candidates for the title of 'the origin of the English magistracy' suggest that we are dealing with a gradual process which occurred during the 13th and 14th. The Statute of 1361 consolidated the position of the Justices of the Peace and, although in the period immediately following this Act their position was uncertain for a time, apart from a few brief periods they never lost their

power to determine the indictments that they initiated.(9) More importantly, their authority was extended beyond criminal matters to cover economic and administrative affairs.(10) For example, in 1378, Richard II reviewed the institution and prepared a complete set of documents relating to the functions of J.P.s. According to the writ prepared by Parliament:

they were to summon and bind to keep the peace those who threatened the lives and property of others; they were to enquire by wise and lawful men of the county into highway robberies, mayhem, murders, and other felonies, trespassing, forestalling, regreting, maintainance, confederacies, extortions, disturbances of the peace, weights and measures, labourers, artificers, servants, and others offending against the labour laws; and to determine and punish according to the laws, customs, and statutes of the realm.

C Beard The Office of Justice of the Peace in England p.45

In this very early period, the J.P.s existed alongside the older offices such as sheriff and coroner associated with the Norman police system but, as their powers grew, they came to

replace them as the primary peace keeping agents. The supremacy of the Justices over the sheriffs was finally sealed by an Act of 1461 which "...laid down that all indictments and presentments which were normally taken at (the Sheriff's) tourn, when twice a year he presided over sessions of each hundred in his shire and exercised summary jurisdiction over such petty offences as brawls and affrays, should in future be taken before the Justices."(11) From this time on the Justices were clearly established, not only as the primary peace keeping force but also as the premier instrument of local government. It became customary to pass on all such duties to them and the period from the late 14th to 1640 was one in which the responsibilities of J.P.s expanded rapidly in a number of areas.

(a) Labour Regulation

One of the earliest functions given to the new justices was the regulation of labour. This began in 1348 when, following the Black Death, there was a shortage of labour and a series of statutes were passed to restrict the movement of labourers

and to regulate their wages. At this stage, responsibility for the enforcement of these statutes was in the hands of special officers - Justices of Labourers - but towards the end of Edward III's reign an Act (42 Edw. III, c.6) was passed which gave J.P.s power to hear and determine in all cases under statutes made for labourers and artificers and to award damages according to the extent of trespass.(12) Under Richard II (2 Ric. II, s.1, c.8) J.P.s powers were further strengthened. Labourers and servants were forbidden to leave their respective communities without letters of patent under the King's seal which was held by J.P.s and other local people of importance. Also, artificers were ordered to work at harvest time under pain of punishment by J.P.s and the wages of artificers and labourers were to be rated by J.P.s at Quaterly Sessions (13).

During Henry IV's reign, when labour was again in short supply, new legislation was passed giving J.P.s further powers to regulate the movement of labour. An Act (23 Hen. IV, c.12) was passed stating that parents could not apprentice their

children to any trade unless they had 20s. per year in land or rent. J.P.s were responsible for testifying to the value of parents. They were also given powers to punish violators of the labour laws. "They could issue writs to any sheriff in the kingdom ordering the arrest of labourers; they guarded the labour statutes after they had been proclaimed by the sheriffs; and in their quarter sessions, they examined labourers and masters on oath and confession, and punished them without indictment for transgression of the labour laws."(14) Under Edward VI (2&3 Edw. VI, c.15) J.P.s were given new powers to punish combinations of labourers. This statute empowered them to issue severe punishment to artificers who combined to force 'certain arbitrary conditions' upon employers. "For the first offence there was a penalty of £10 or imprisonment; for the second £20 or pillory; and for the third £40 or pillory, the loss of an ear and infamy."(15)

The various labour statutes culminated in a comprehensive measure in 1563 (5 Eliz. I, c.4) - The Statute of Artificers -

which gave J.P.s considerable powers to control the wages and movement of labourers. Wages were fixed by J.P.s at Quarter Sessions and two J.P.s in Petty Sessions could punish anyone who took wages in excess of the authorised scale of wages, with a crippling fine or imprisonment (employers only by a light fine!). Servants could not leave their position without buying a ticket of release (at 1d or 2d) from their employer. J.P.s were also given summary powers to deal with cases of assault by employees against masters.(16)

(b) The Poor and Vagrancy

Closely connected to the J.P.s functions in the regulation of labour was their role in the regulation of the poor. Systematic legislation began with an Act of 1531 (19 Hen. VII, c.12) which stated that the aged poor and impotent persons must have a licence to beg within their districts and they were forbidden to go beyond the confines of their districts. J.P.s were responsible for the administration of this statute. It was they who were to grant these licences and they who were empowered to punish the transgressors by whipping or the

stocks. They were also given the power to whip able-bodied beggars and return them to their birthplace.(17) A number of further statutes relating to the poor law were passed by both Edward VI and Mary,(18) but they were systematised in the late C16th under Elizabeth I. The law relating to the poor was codified by a statute of 1572 (14 Eliz. I, c.5). This statute reenacted the penal measures against idlers and beggars, rogues and vagabonds and made the additional provision that J.P.s may "place and settle to work the rogues and vagabonds either born within the county, or being three years resident therein, there to be holden to work to get their livings and to live and be sustained only upon their labour and travail."(19) This Act was explained and made more effective by another Act passed in 1576 (18 Eliz I, c.3) which also directed the J.P.s to "appoint and order (that) a competent stock of wool, hemp, flax, iron and other stuff' should be obtained from the rates and given to the mayor or other persons in each place, as the Justices decide."(20) The provisions of the 1572 and 1576 Acts were reenacted in a simpler and more systematic form by the statute of 1598 (39

Eliz. I, c.3). This Act was important because it consolidated the extensive powers that J.P.s had been collecting in relation to the poor laws and because it served as the basis of their power in this area for the next two centuries.

By this Act the parish was retained as the lowest unit for poor-law administration and upon it was thrown the financial burden. The local execution of the law was placed in charge of two overseers of the poor nominated yearly by two justices of the peace, one of the Quorum, who were residents of the parish or at least nearby. The overseers so chosen were to act under the complete supervision of the justices of the peace in the performance of their duties, which may be summarised as follows: they were to put to work the children of parents too poor to support them and all other persons without the means of support, and to supply a stock of materials for the employment of the poor: they could tax the inhabitants of the parish and the occupiers of lands for the support of the poor and the impotent, and do "all other things concerning the premises as to them shall seem convenient". The overseers with the permission of a lord of the manor in which there was waste land, could make provisions for the erection of poorhouses. In the execution of this act, the duties of the justices of the peace were

mostly supervisory and corrective. They were to require a strict account from the overseers, and in case any parish was not able to pay the required assessment, the justices in quarter sessions could assess any other parish or number of parishes for the benefit of the poor community. They could commit any person who made default in payment of the assessment, and they could punish the church wardens who did not give full reports of the finances according to the law. They were to hear all complaints against the overseers and to send to the house of correction all persons who refused to work under the orders of the overseers. In the quarter sessions, the justices could rate the parishes and force the collection of money for the poor prisoners at the King's Bench, and for the support of the county hospitals and almshouses. The money so collected was to be delivered to two justices chosen as treasurers. These treasurers were to pay a portion of the money to the Lord Chief Justice, disburse the remainder according to the statute, and render an account of the business to quarter sessions. This general measure was altered in no essential principle by an act a few years later, and so it may be regarded as marking the culmination of

the powers of the justices of the peace as poor-law administrators under the Tudors.

C. Beard The Office of the Justice of the Peace In England pp.90-91.

At about the same time another Act (39 & 40 Eliz. I, c.40) gave J.P.s the power to erect, maintain and govern houses of correction. It also empowered them to apprehend any wandering idler and to have him stripped to the waist, whipped until bloody, and then sent to the place of his birth, or to the parish through which he last passed without punishment. After administering the punishment the Justice was to issue a testimonial of the fact to the beggar and to have it recorded by the minister of the parish.(21)

(c) Trade

The extension of the Justices powers also involved them in the regulation of trade and industry. Even in the pre-Tudor period they were involved in regulating guilds: "They adjusted the profits which victuallers were to receive; they punished regrators of wool and other merchandise of the Staple; they

supervised the shipment and exportation of wool and the details of the manufacture of woollen cloth. They enforced the statutes regulating the preparation of leather, the manufacture of arrow heads, tuns, barrels, and hogsheads, wax candles and images, and tiles."(22) Later, under the Tudors, they were involved in the regulation of prices of wine (24 Hen. VIII, c.6 and 7 Edw. VI, c.5), and meat (24 Hen. VIII,c.3). They were given powers to punish combinations of victuallers (2&3 Edw. VI, c.15) and regrators, ingrossers and forestallers (5&6 Edw. Vi, c.14). They were involved in Acts regulating: leather trade; boots and shoe manufacture; weaving and dying woollens; preparation of malt; and Acts providing for improvement in the breed of horses, fixing the time for killing calves and weanlings, ordering the preservation of forests, protecting the spawn and fry of eels and salmon, regulating sizes of wood and measures of coal.(23)

(d) Administration

Under the rule of the Tudors, J.P.s were also given responsibility for a number of other aspects of county admin-

istration. During the reign of Henry VIII, they were given responsibility for the maintainance of roads and bridges. Where responsibility could be allocated they were empowered to compel the culprit to pay the cost, otherwise the local population was to be taxed to meet the expenses.(24) Later, their powers were extended to include the building of new roads.(25)

J.P.s were also given responsibility for the county gaols. Under Henry VIII, J.P.s in some counties were authorised to decide which towns should have gaols and to determine the amount of money required (23 Hen. VIII, c.2). "They could lay the necessary tax, appoint the collectors for the levy and the surveyors for the erection of the structure, and punish all officers concerned for the defaults."(26) Another statute in 1572 enabled J.P.s to levy a sum of 6d - 8d per week on each parish to provide food for prisoners.(27)

The other main area of administration in which J.P.s were involved under the Tudors was the licencing of public houses which began in 1552 (5&6 Edw. VI, c.25). This Act made two

J.P.s responsible for issuing licences and it also gave two J.P.s power to issue heavy penalties to anyone keeping an alehouse without a licence.(28) "The result was that the Justices had it in their power to create a valuable property, and to give it to whom they chose".(29)

(e) General Policing

In addition to the various new powers that were being heaped upon the Justices during this period, their original policing role was also being developed and strengthened. In particular, they were given increasingly extensive powers to deal with riots. Under Richard II an Act (15 Ric. II, c.2) was passed empowering J.P.s to take sufficient force of the county and go to the scene of a riot, forcible entry, disturbance of the peace, etc. The Act gave them the power to compel people to assist them in this task on pain of fine and imprisonment.(30) These powers were later extended (8 Hen. VI, c.8) to include peaceable entry and the forcible holding of lands.(31) More legislation relating to riots was passed by Henry VII (11 Hen. VII, c.7) and Edward VI (3&4 Edw. VI, c.5). The latter

was a fairly comprehensive measure which brought together and reinforced existing legislation on riots. This Act - known as the Riot Act - served as the basis of magistrates' powers in this area until 1714.(32)

During the Tudor period, Justices were also given a number of other general policing duties. They were responsible for statutes regulating hunting and unlawful games; they could hear and determine cases of unlawful perjury, unlawful usury, and petty misdemeanours (breaking fences, robbing orchards, despoiling woodlands and gardens); they were to enforce the statutes encouraging archery practice and the keeping of longbows, and; they were also involved in the suppression of Catholics and Catholicism.(33) Later, under the Stuarts, magistrates' powers were extended into other areas. "The 'loathesome and odious sin of drunkenness' was made an offence by an Act of 1608, under a penalty of a fine of five shillings or six hours in the stocks. Swearing was dealt with by an Act of 1623, conviction involving a fine of one shilling. In the case of both offences the fines were to be devoted to the poor

of the parish where the offence was committed." (34) In 1625 and 1627 Acts were also passed imposing stringent regulations on Sunday observance. A single Justice was given powers to deal with offenders on the spot. (35)

Magistrates And The Crisis Of Feudalism

The conventional histories offer a thorough description of the formation of the magistracy and the subsequent expansion of the powers of J.P.s but for the most part, their accounts have been confined to a narrative of events without attempting to analyse the developments that they describe. Their failure to address the question of why the institution of the Justice of the Peace emerged or why it flourished under the Tudors and Stuarts lies in their teleological view of the English magistracy. Behind their apparently neutral description lies a tacit acceptance of the inevitability of the emergence of the magistracy. Thus, when discussing the early history of the magistracy, Beard says:

The only solution which the government could devise

was the extension of the powers of the guardians of the peace, and thus under the stress of social need, the office was advanced by stages to the position of a court of record with far-reaching powers for summary and effective action. It was quite natural also that the knights of the shire, who had assumed such a prominent part in the parliamentary government of the period, should secure to themselves the powers of local government.

C. Beard The Office Of Justice Of The Peace In England p.35 (my emphasis)

In this passage, Beard implies that the formation of the magistracy was a "natural" development. Clearly, if this is the case then no further explanation is required except possibly to explain how they occurred or why they occurred at one time rather than another. For example, Beard explains the origins of the magistracy in terms of the need for a new peace keeping force resulting from a growing problem of order in the mid-14th caused by the Black Death and the long war with France.(36) In criticising Beard's account we are not suggesting that there was not a problem of order in the mid-14th, nor are we denying the significance of the factors

that he identifies. We would even accept that the Statute of 1361 was a response to this situation. However, by focusing exclusively on these immediate causal factors Beard is unable to explain why the particular instrument chosen to respond to the problem of order in the mid-14th was the Justice of the Peace. More importantly, he ignores the fact that the formation and consolidation of the magistracy was a gradual process. He has himself dated the origins of J.P.s back to 1195 and he, too, has documented the rapid expansion of magistrates' powers in the two centuries following the Justices of the Peace Act. It should be quite clear that a process which spans four hundred years or more cannot be explained simply in terms of factors specific to the mid-14th. Rather, the early development of the magistracy must be located in the context of wider changes that were occurring throughout the period from the 13th to the 16th - i.e. the period of late feudalism.

Within the conventional literature Redlich provides one of the very rare attempts to relate the development of the magist-

racy to changes in feudal society by arguing that the growth of the magistracy enabled the English constitution to rid itself of feudalism.

It is true that a kind of social or practical feudalism survived owing to the continued predominance of the great landowner, and that this predominance - secured and preserved by the peculiar characteristics of the English law of real property - remains a modified but still considerable force in the politics and society of the present day. But of far more importance for the development of constitutional government was the rapid absorption by the Justices of feudal powers of jurisdiction and administration. And although this process did not involve the disappearance of venerable antiquities like the Manorial Courts and the Courts Leet till several centuries after its completion, still these were only meaningless survivals - shadowy forms deprived of their life and strength by the vigorous development of the new office. For not only were the Justices of the Peace exercising severally and jointly the whole of the preventive powers and police jurisdiction formerly wielded by the feudal courts, but the latter were deserted by the chief men of the townships and tithings of the old Hundred Moot, who were now bound to appear as the Grand Jury to make presentments at the Quarter Sessions of the

Justices of the Peace. In this way the hundreds and their tithings, the oldest divisions of English local government, were subordinated to the Justices of the Peace; and the process which relieved English administration of feudalism was completed by the beginning of the fifteenth century.

J. Redlich and F. Hirst The History of Local Government in England p.17.(37)

Redlich attempts to locate the expansion of the English magistracy within the wider structure of British society, but he actually offers little more than description. Although he escapes from the assumption of inevitability, he nevertheless offers a post hoc account in terms of the importance of this development for the emergence of constitutional government in the C19th. In this way, he fails to explore the political formation which gave rise to the magistracy and he offers no explanation of the form that it took in its early stages.

The fundamental error in all of the conventional histories lies in this failure to consider the political considerations behind both the formation and subsequent growth of the magistracy. There has been a marked tendency to present these

phenomena as if the institution of the Justice of the Peace developed in a vacuum, isolated from the political forces affecting the wider society. Although there has been considerable debate amongst historians about the nature of feudalism in this period, there is a broad agreement that it was one of crisis(38) out of which emerged a new form of domination.

Athough the central feature of this new form of domination was the strengthening of the power of central government, through the absolutist state, the Crown ruled at the local level through the Justices of the Peace. .

The Justices of the Peace were the agents of this royal nationalism. From the Reformation the ecclesiastical machinery of the parish was at their disposal, supplying what they had hitherto lacked, subordinate officers to carry out their commands. J.P.s were appointed by the crown, and the dependants of the great magnates were deliberately excluded from the commission of the peace. It instructed justices to act 'as well within liberties as without', thus encouraging them to break down the immunities of feudal lords. Society ceased to be, in Aubrey's vivid phrase, 'like a nest of boxes', with villeins holding of lords of manors who held of a

superior lord who held of the king.

C. Hill Reformation to Industrial Revolution p.33.

Hilton has shown that, even at an early stage the magistracy were part of this new form of domination.(39) This can be seen most clearly in the fact that they were the instruments used by the government in its attempted wage-freeze under the 1351 Statute of Labourers(40) and more generally in the way in which J.P.s powers were developed in relation to the regulation of labourers and the poor.(41)

However, having said this, it would seem that the relationship between central government and the J.P.s was complex and, although the magistracy formed an important component of the absolutist state, they were also a contradictory element within it. Insofar as the conventional histories refer to this relationship at all, they have seen it purely in terms of the many attempts of central government to strengthen their control over the magistrates.(42) They rarely comment on this except, as in the following extract, to sympathise with the overburdened magistrates.

As the narrative has shown the outstanding feature of that lengthy period was the wide and varied range of extraneous duties that were thrust upon them. By the 16th century they had become the maids-of-all-work of every branch of government. It was a development that accorded well with the Tudor ideas of government from the centre - the innumerable directions from the Council show how energetically and consistently that aim was pursued. Equally the many reproofs administered to the Justices reveal the disappointment of authority that its directions were not being executed with the precision that a central bureaucracy might reasonably expect from its subordinates. A little reflection might have shown the reason why.

B. Osborne Justices of the Peace 1361-1848 p.59.

Apart from the obvious partiality of these comments, the major problem with Osborne's account is that he assumes that the 'reproofs' and 'expressions of disappointment' emanating from the central bureaucracy reflect the total subordination of the J.P.s. The same mistake has been made by Sydney and Beatrice Webb. They describe the period immediately preceeding the Civil War (i.e., 1590-1640) as one which witnessed an element of central control (from the Privy Council) in local govern-

ment hitherto unknown and which did not reappear until the 1830s. They go on to say that there was:

an almost continuous series of letters, instructions and orders, emanating from a central government department, in the names of the Privy Council or some members of it, either to the Assize Judges, or to the Lords Lieutenants or High Sheriffs of the various counties, or directly to the Justices of the Peace in Quarter Sessions, insisting that the statutes for the relief of the poor and maimed soldiers, for the maintainance of tillage and the repression of vagabondage, for the regulation of alehouses and of the sale of bread, and for the suppression of recusancy and crime should be put in operation. These instructions took different forms eg. asking them to make special arrangements for special sessions to consider what to do; directions to intervene to prevent employers laying off workers.

S. & B. Webb English Poor Law History Vol.I p.65.

Implicit within this passage, is the assumption that the flow of letters and the generally hectic activity of central government during this period is an unproblematic reflection of its strength. However, although county magistrates were

clearly restricted by central government, the fact that it was necessary to continually restrain their activities suggests that, there was a major conflict between the central and local elements of the absolutist state. We would suggest that the source of this tension lay in the role of the gentry during this period. From its inception, the choice of Justices of the Peace as the instrument to perform the regulatory functions for the absolutist state appears to have been the product of struggle. Thus, Moir demonstrates that the statute of 1361 marked the resolution of a long period of conflict between the House of Commons (representing the interests of the gentry and the burgesses) and members of the central government (notably Sir Geoffrey Scrope, then Chief Justice of the King's Bench) who, "wanted to rely on specially commissioned royal justices, probably distinguished by lawyers and magnates, with extraordinary powers to deal with all offences." (43) This conflict was reflected in the changing powers of the J.P.s between 1327 and 1361 culminating in a victory for the gentry in the Statute of 1361.

Because the magistracy was recruited exclusively from the gentry, the growth of J.P.s powers in the period from 1361 to 1640, involved a steady strengthening of their political power. This was significant because, at the same time, the gentry were becoming increasingly converted to capitalist agriculture(44) and were developing as an embryo capitalist class with different interests to those of the Monarchy. By the 16th and 17th, they were using their magisterial powers to further their own interest, sometimes at the expense of central government. For example, when discussing the Statute of Artificers (1563), Hill observes that the power which this gave magistrates to punish labourers who took more than the minimum wage was a very useful weapon in their armoury as employers. However, he also notes that this clause was not always enforced: "On occasions, in areas where there was a shortage of labour, J.P.s would wink at its infraction".(45) The important point is that the law was enforced at the discretion of the magistrates and if it was not in their interests to enforce the law rigidly then they would ignore its infraction. In this particular example there was probably little

conflict with the interests of the Crown but at other times magistrates were prepared to exercise their discretionary powers in direct opposition to the interests of the monarchy. In particular, Charles I's final bid to create a fiscal base through the imposition of a Ship Tax was sabotaged by the refusal of J.P.s to operate it.(46)

The contradictory role of the gentry within the absolutist state is summed up in the following passage from Christopher Hill.

Thus England, in the words of Professor MacCaffrey, became a hybrid political society, in which centralized monarchy existed side by side with a kind of confederation of local political interests. Parliament represented these interests to the central government. The latter depended on the gentry as M.P.s for taxes, on the gentry as J.P.s and deputy lieutenants for the maintenance of order, and used gentlemen increasingly as civil servants. Since it needed their support for the break with Rome, it allowed them to purchase monastic lands (or allowed members of other classes to make themselves gentlemen through the purchase of monastic lands) - in order that, as one gentleman

purchaser put it, 'his heirs may be of the same mind for their own profit'. Tudor governments thus inevitably favoured the process which Professor Tawney called 'the rise of the gentry'. By the time that the gentry became collectively as strong as the feudal baronage had been in the fifteenth century, able to claim privileges and powers for the House of Commons such as had previously been claimed for the House of Lords, it was too late for Stuart governments to reverse the process.

C. Hill Reformation to Industrial Revolution p.31.

It would seem then that the position of the magistracy was more complex than has been suggested by the conventional histories. In particular, the formation and the growth of the institution of Justice of the Peace did not take place in a social and political vacuum, but rather it appears to have been closely related to the rise of the gentry and their contradictory position within the absolutist state. Rather than being a natural development, it can, perhaps, better be understood as part of the new form of domination that emerged in response to the crisis of feudalism. Moreover, although magistrates were constrained by central government, the

attempts to control their activities can be seen, not simply as a show of strength, but as an attempt to resolve the inherent contradictions within the absolutist state resulting from its reliance upon an embryo class of capitalist land-owners with different and sometimes conflicting interests to those of the monarchy.

SUMMARY

Although, in covering such a vast historical period, we have relied upon secondary sources, we have been able to outline those features of the early development of the magistracy which are important for our later analysis. Firstly, we have seen that the range of powers entrusted to J.P.s grew enormously between 1361 and 1640 to the extent that they were responsible for virtually all aspects of local government. Secondly, we have shown that this development did not occur in isolation - as the conventional histories frequently imply - but that it was the product of the social and political formation of the period. In particular, the growth of the magistracy was intimately connected with the growth of the

gentry. This function of the county magistracy as the power base of the gentry became increasingly important in the C18th and their reluctance to lose it had a significant effect upon the later developments in the C19th.

We have also suggested that the gentry magistrates constituted a contradictory element within the absolutist state and that, as they increasingly engaged in capitalist agriculture, this created the strains which led to the series of attempts by central government to control the activities of magistrates. In the following chapter, we will see that, with the abolition of the absolutist state, these contradictions were removed and the gentry magistracy emerged as a key element in the transitional form of rule that characterised the C18th.

CHAPTER FIVE

THE RULE OF THE GENTRY : MAGISTRATES IN THE EIGHTEENTH CENTURY

Introduction

A number of histories have shown that, in the period between 1689 and the early decades of the C19th, the English magistracy enjoyed greater power than at any time in its long history. We will argue that magistrates did not simply grow in strength during this period but that their functions changed following the Civil War and the emergence of the rule of the gentry.

The Powers Of Eighteenth Century Magistrates

Conventional histories have shown that the C18th was a period in which the powers of the English magistracy reached a peak. These powers were organised on three levels. The highest level was the Quarter Sessions which comprised of all the magistrates in the county and which, after 1689, was the supreme county authority. This body had a legal function

similar to that of the Assizes in that it was formally entitled to pass a sentence of death on certain offenders.(1) It also had a rapidly growing administrative function. By 1689 it carried out the bulk of the civil administration of the county:

The repairing of bridges, the maintainance of the King's gaols, the building and management of the newer Houses of Correction, the fixing of wages, prices and rates of land carriage, the licensing of various kinds of traders, the suppression of disorderly houses, the sanctioning of special levies for various parish needs, the confirmation or disallowance of the orders of individual Justices or pairs of Justices on every conceivable subject, were among the multifarious civil functions of Quarter Sessions.

S. & B. Webb The Parish and the County pp.296-297

This list was continually added to throughout the eighteenth century. By this time the role of J.P.s as local administrators was beyond question and, whenever new legislation was passed, responsibility for its administration in the counties was invariably placed in their hands.

At the next level were meetings of groups of magistrates in a particular locality. These can be sub-divided into Special Sessions and Petty Sessions. Special Sessions were monthly meetings of magistrates in particular areas of the county.

At these local sessions, held at stated times and places, only those Justices resident in the Divisions were summoned, together with the local Hundred and parish officers. If we may judge from the Privy Council Order of 1605, there was nothing that these Divisional Sessions were not competent to deal with, except the actual trial of offences requiring a Jury, and such orders for expenditure as needed presentment by the Grand Inquest, or appertained to the county as a whole.

S. & B. Webb The Parish and the County pp.297-298

Petty Sessions is the term used to describe those occasions when two or more magistrates sat together to administer summary justice. Although summary justice did not develop fully until the C19th, magistrates in Petty Sessions already had fairly wide powers to try and sentence certain types of offenders.(2)

Hence, there existed in 1689, alongside of the Quarter Sessions and the Divisional Sessions, a rough and ready organization of Petty Sessions or Privy Sessions - informal meetings of two or three justices at the village inn, or even in their own parlours - to appoint Overseers of the Poor and Surveyors of Highways, to allow their accounts, to sanction the parish Poor Rate, to make orders for the removal of paupers to their place of settlement, to order the maintainance of a bastard child by its reputed father, to commit to the House of Correction parish officers who neglected to account for their expenditure or parents who refused to support their children, as well as to try, convict and sentence persons guilty of various minor offences, or to hear and commit for trial at Quarter Sessions those accused of assault, petty larceny, and graver offences against the law of the land.

S. & B. Webb The Parish and the County p299.

In addition to the powers that magistrates possessed when sitting together they also possessed certain powers to act alone. In their administrative role they were responsible for the organisation of the Parish. Magistrates' control over local officials dates back before the Civil War but during the C17th and C18th this control was strengthened. For example, in

1662 the power to appoint parish constables was transferred to J.P.s(3) and in 1691 an Act was passed giving J.P.s power to appoint the Surveyor of Highways.(4) Perhaps their most important administrative duty was the control of Overseers of the Poor. These officials were appointed by Petty Sessions but the day-to-day control of their activities lay with individual magistrates.(5) "And it was to the individual Justice, as much as to High and Petty Constables, that Quarter Sessions looked for the presentment, 'on his own view', of parishes and parish officers for defaults in fulfilling their legal obligations - a presentment which carried the same weight as if made by a Jury of twelve sworn men."(6)

In their legal capacity, single magistrates had powers to issue summonses requiring the defendant to appear at the next Sessions and to issue warrants for the arrest of suspects.(7) In certain cases, Single Justices were also empowered to exercise a summary authority over offenders. Thus, "If he heard a profane oath, discovered any person tippling in an ale-house, or saw a man drunk, he could, 'on his own view',

and without further evidence or formality, then and there sentence the offender to pay a fine, commit him to prison in default of payment, or order him to be put in the stocks for four hours." (8) Any person not attending church could be fined 1 shilling, labourers attending a bull-baiting, or similar sport, on a Sunday could be fined or set in the stocks, and other forms of non-observance of the Sabbath (eg. carriers conveying goods, or butchers killing beasts or selling meat) could be dealt with even more severely. (9) But, according to the Webbs, the greatest authority of a Single Justice lay in his power to deal with vagrants.

If after hearing the evidence of a village constable, or other witness, he chose to consider any person, male or female, guilty of any act of vagrancy, he might condemn such person to the stocks, order him to be stripped from the middle up and soundly whipped in public 'until his back be bloody', and then despatch him with an ignominious pass to his last place of settlement."

S. & B. Webb The Parish and the County pp.300-301

Magistrates had one other important function which the Webbs do

not discuss fully - i.e., they were responsible for policing and keeping order in their districts. As we have seen, magistrates had held this responsibility since their initial formation. Thus, it was not a new power but it took on a new dimension during the 18th with the passing of the notorious 'Riot Act' in 1714 which enabled them to use troops to forcefully disperse a crowd - a power which they used against the "food riots" that became an increasingly popular form of social protest during this period.(10)

In fact, the strength of the magistracy was still greater than the growth of their formal powers suggests because they were simultaneously developing a range of informal powers which do not appear in any Statute. Their extensive discretionary powers and the absence of any effective control from above enabled them to become a de facto legislature.(11) At the local level: "The same power of themselves deciding the cases, coupled with the power to give commands to all officers of townships or parishes, enabled the Justices, in practically any detail of local administration, to convert their own

opinions into mandatory enactments."(12) At the county level, when the magistrates were gathered together in Quarter Sessions, they could decide how to implement the various Statutes for which they were responsible or, indeed, they could choose not to implement them at all. Furthermore, the fact that it became customary during this period for Parliament to distribute Bills to the magistrates in Quarter Sessions and to ask their opinion before presenting them to the House of Commons(13) suggests that central government gave at least tacit encouragement to the growth of these informal powers. The strength of the C18th magistrates is summed up well by the Webbs when they discuss the transition from a situation in which the county was administered by a quarterly Court of Justice, answerable to higher courts (and generally 'open') to the situation prevailing in the C18th in which J.P.s, operating behind closed doors, had become both a legislative and executive body with considerable autonomy from central control.

We have now seen how, in the course of little more

than a century, this judicial tribunal was, as regards the civil administration of the county, silently and almost imperceptibly replaced in every county by an organised local legislature and executive, composed exclusively of magistrates and such persons as they chose to consult; meeting in private at any dates and in any places; convened by chairmen, served by salaried officials, and advised by committees, all unknown to the legal constitution; deliberating on any matters without formality or notice; recording or not recording their 'orders' as they chose; amending them, varying them, or rescinding them as the haphazard majority of the moment thought fit; and issuing them, with undisputed authority, as friendly 'recommendations' to all the Justices of the county, as 'requests' to the local committees of Justices meeting in Special and Petty Sessions, or as private 'instructions' to their salaried executive staff, - even advertising them to the ordinary citizen as the principles according to which future judicial decisions would be given.

S. & B. Webb The Parish and the County p550

Magistrates, Agrarian Capitalism And Gentry Rule

However, although the Webbs offer an excellent description of the powers of C18th magistrates, they make little or no

attempt to locate the basis of this power in the underlying social relations of the period. As will become apparent, they introduce a class dimension into their account by illustrating some of the ways in which the gentry magistrates used their position to protect their own property interests, but the Webbs share a tendency with other historians of the magistracy to portray the growth of magisterial powers as a straightforward linear development of the powers acquired in the C15th and C16th.

In the previous chapter we saw that both the class composition of the magistracy and the growth of their powers can be traced back at least 300 years before the Restoration, but their position in the C18th was more than a simple continuation of these trends. Rather than a gradual increase of magistrates' powers, the position in the period after 1688 is divided from that discussed in the previous chapter by a fundamental break. We have seen that the form taken by the magistracy prior to 1640 was closely related to the role of the gentry within the absolutist state but, as the Civil War destroyed the

absolutist monarchy and the remnants of feudalism, the development of the magistracy in the C18th can not be explained in the same way. Rather, the period from 1688 to the early C19th was a transitional period based upon early forms of agrarian and mercantile capitalism. We have seen that the gentry were becoming increasingly involved in capitalist agriculture and that they were a powerful force in Britain during the C15th and C16th but, as Christopher Hill has shown us, it was the Revolution that brought them to ascendancy.

When the Civil War broke out in 1640 the loyalties of the gentry were split with Parliament drawing its support largely from the south and east, whereas Charles' strongholds were largely in the north and west. This split reflects the uneven nature of the development of capitalist agriculture which had influenced many landowners in the south and east whilst the northern and western parts of England had been relatively unaffected.(14) However, the Revolution helped to destroy the conservative gentry. The lands of Church and Crown and of many leading Royalists were confiscated and sold and others were

taxed to the verge of ruin.

For many owners of economically undeveloped estates who were already desperately in debt, the period of the Commonwealth and after represented a great foreclosing on mortgages, capital at last getting its own back against improvident landlords.

C. Hill The English Revolution 1640 p.54.

Land was restored to Church and Crown in 1660 and some of the wealthier Royalists bought back their land before then but the old order did not return.

...the mass of smaller Royalists who had sold their estates privately after ruining themselves in the cause, got no redress. And even where landowners were restored, they were not restored on the old conditions. Feudal tenures had been abolished in 1646, and confirmation of their abolition was the first business Parliament turned its attention to after recalling the King in 1660; the absolute property rights of big landlords were secure. Between 1646 and 1660 many of the confiscated lands had passed into the possession of speculative purchasers, mostly bourgeois, who had improved cultivation, enclosed, racked rents up to the market

level. The returned Royalists had perforce to adapt themselves to the new free market conditions, i.e. to turn themselves into capitalist farmers or lessors of their estates, or they went under in the competitive struggle.

C. Hill The English Revolution 1640 p.58.

Thus, the Revolution hastened the process of conversion to capitalist agriculture and by 1660, and certainly by 1688, the gentry had become a fairly cohesive class of capitalist land-owners who, having overthrown the absolutist monarchy, ruled through their dual role of M.P. and J.P..

Thus, although in many ways the position described by the Webbs represented an extension of powers that had been granted to magistrates in an earlier period, the functions of the magistracy changed in the 18th. Whereas, before the Civil War, the magistracy had constituted an element within the absolutist state, after 1688, it became a key part of the rule of the gentry. Thus, the change that occurred as a result of the Civil War and the Revolution was not a straightforward growth of magistrates' powers, but a change in the form of the

magistracy.

However, although 18th British society was dominated by agrarian capitalism, this was a period of transition and this is reflected in the nature of the magistracy. One of the most obvious changes - and this has been noted by most conventional historians, including the Webbs - was that 18th magistrates were drawn almost exclusively from the gentry (or beneficed clergy). They had always been drawn largely from this class but, during the 18th, a number of factors helped to strengthen the homogeneity of the magistracy. In particular, the mode of appointment of magistrates changed so that Lords Lieutenants rather than Assize Judges made recommendations to the Lord Chancellor. This effectively put an end to the appointment of 'Justices of mean degree' because the Lords Lieutenants did not recommend anyone likely to be unwelcome to the existing magistrates. Another factor which is sometimes pointed to in this connection is the Act of 1732(15) which increased the property qualification to £100. There is some debate about whether this legislation in itself was

sufficient to exclude "lesser men" from the Bench. Quinault suggests that the qualification was deliberately fixed at a low value to enable quite minor landowners to become magistrates: "...it made eligible for admission to the Bench men who, although attached to the propertied class, were in no sense county magnates." (16) Osborne goes further and says that, given the reduction in the value of money since 1439 (when the property qualification had been fixed at £20) the 1732 Act merely updated the property qualification in accord with the inflation of the previous 300 years. For him the figure of £100 was not, in itself, prohibitive. Rather, it signalled the intention to restrict the composition of the magistracy to the landed class. (17) Whatever the merits of the positions of these authors, the fact remains that - with the exception of manufacturing millionaires such as the Arkwrights and the Strutts who were appointed to the county benches in the late C18th and early C19th (18) - the social exclusivity of the magistracy appears to have been maintained throughout the C18th and:

We accordingly leave the County Benches in 1835 composed (with either no clergymen or else a considerable proportion of them) almost exclusively of the principle landed proprietors within the county, whose fathers and grandfathers had held their estates before them; nearly all men of high standing and personal honour according to their own social code, but narrowly conventional in opinions and prejudices; and - with the exception of the old Whig families of the governing class who could not decently be kept out - exclusively Tory in politics.

S. & B. Webb The Parish and the County p386

However, although the strengthening of the position of the gentry on the magistrates' bench was a significant development, the nature of gentry rule did not reside simply in the personnel of the ruling class. Rather, the magistrates' court formed an important part of the particular form of law that emerged in the C18th.

The most striking feature of C18th law is the dramatic rise in the number of property offences punishable by death - according to Radzinowicz, there were 190 new capital offences between 1688 and 1810 and the actual scope of the death

penalty was still more extensive because of the way that some of the statutes were drawn up.(19) This coincided with the acceleration (following the removal of restrictions imposed by central government) in the process through which the gentry were enclosing the common land for their own private use. Through this process, the gentry converted the common land with its associated use rights into private property. In thus restricting the use of the common land, they not only interfered with long established customs and practices but also threatened the destruction of the traditional economy which depended upon these customary rights.(20) Rural labourers, capitalist farmers and some of the lesser gentry, who were excluded by this conversion of common land into private property, responded by either destroying property or continuing to exercise their traditional rights to the use of the land.(21) The series of capital statutes can be seen as an attempt by the gentry to protect their newly acquired property rights. However, as Douglas Hay, in his seminal work on 18th century criminal law, has shown, the number of offenders actually executed during this period declined and it was the threat of

capital punishment, rather than the punishment itself, which was important for the gentry's rule. The ever-present threat of capital punishment enabled the gentry to exercise discretion and thus enhance the dependancy of their social inferiors.

Here was the peculiar genius of the law. It allowed the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law's incorruptible impartiality, and absolute determinacy. Their political and social power was reinforced daily by bonds of obligation on one side and condescension on the other, as prosecutors, gentlemen and peers decided to invoke the law or agreed to show mercy. Discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude, or at least the approval of his neighbourhood as a man of compassion. It allowed the class that passed one of the bloodiest penal codes in Europe to congratulate *itself on its* humanity. ... The law was important as gross coercion; it was equally important as ideology. Its majesty, justice and mercy helped to create the spirit of consent and submission, the 'mind-forged

manacles', which Blake saw binding the English poor.

D. Hay Property Authority and the Criminal Law
pp.48-49.

The dependency which was created in this way was an essential part of C18th law in that it afforded an effective means of protecting the property of the gentry. Hay has further shown that the alternative penal code, envisaged by the reformers, would have been of little benefit to the gentry. Their most serious threat was from forgery because this was the only way of taking their greatest possession - land - but forgery was dealt with effectively by the existing penal code. The other major threats to their possessions came from sabotage and from their own servants. In both cases legal reform or the creation of a police force would have made little difference and may in fact have made the gentry more vulnerable because it would have taken away their ability to grant pardons.(22) Those whose property suffered most from the C18th penal code were the 'middling men' (i.e., capitalist farmers, merchants and the early industrialists) lower down the social scale who were

not able to benefit from the informal elements embodied in the
C18th legal system.(23)

The nature of eighteenth century criminal law reflects the
transitional nature of this period. It was designed to protect
a traditional form of property right and was "less concerned
with the setting in motion of productive forces character-
istic of productive capital than with the appropriation of a
finished product".(24) It offered a legal protection to
property based upon privilege. The legal system, itself,
represented a form of direct domination based upon the terror
of capital punishment and the dependence resulting from the
gentry's ability to grant pardons.(25) Thus, although the
eighteenth century judicial system served to protect
(agrarian) capitalist property, it mirrored the transitional
nature of the period by retaining the characteristics of
absolutist rule, enforcing the privileges of property through
a form of direct domination.

In 'Property, Authority and the Criminal Law', Hay is largely
concerned with the higher levels of the C18th legal system but

at the lower levels magistrates' courts also served to protect gentry property. Magistrates had been granted summary powers to deal with certain offences before the Civil War, but, during the 18th, the scope of these powers increased considerably. The most frequent use of summary prosecutions was for poaching but legislation was passed which:

... provided for summary conviction in cases of theft, suspected theft, destruction or receiving of trees, rails, wood, hollies, grain, fruit and vegetables, turnips, goods on wrecks, metal, yarn and wool, dogs, park pales, hedges, cattle and horses or goods undefined. In addition most of the vast mass of excise offences could be tried by summary proceedings before two or more justices. Vagrants in general and those possessing weapons in particular could be punished, as could food rioters, offenders against the turnpike acts, persons who damaged floodgates and sea-walls, cheating victuallers and bakers and alehousekeepers, those who were caught damaging the property of any of dozens of canals throughout the country, and swearers of profane oaths.

D. Hay Crime, Authority and the Criminal Law
p.314.

Hay's list is not complete(26) but it does give a fairly clear idea of the extent of magistrates' summary powers in this period. At the same time, their powers to punish these offences were also growing. In 1718 they were given the statutory power to transport offenders and, according to Christopher Hill, they used it widely.(27) In the same year they were also empowered to issue whippings and this became the major form of punishment throughout the C18th.(28)

This growth of summary jurisdiction, coupled with the virtual absence of any checks from above,(29) enabled the gentry, in their guise as magistrates, to further their own class interests, particularly in their enforcement of the game laws. Thus, in summing up the evidence from his study of Cannock Chase, Hay says:

The Staffordshire evidence, though limited to the correspondence of a few large landowners, shows a highly discretionary use of the law, usually within legal limits, but always sensitive to the requirements of authority and to the demands of the great

county magnates.

D. Hay Crime, Authority and the Criminal Law
p.308.

In support of this conclusion, Hay cites an example in which a local J.P., by the name of Chetwynd, heard a case in which the Earl of Uxbridge's witness gave contradictory evidence on the vital point of whether she had seen the accused carrying a deer into his house. Hay suggests that he ought to have dismissed the case but, instead, he deferred it for two weeks to enable him to confer with Uxbridge. In the later trial the witness gave a new account of what happened which Chetwynd accepted and which formed the basis for the conviction of the defendant. The Webbs cite another oft-quoted instance involving the Duke of Buckingham.

In 1822, a farmer coarsing hares on his own land, with the permission of his own landlord, was summoned by the keeper of the adjoining landowner for doing so. The adjoining landowner in this particular instance was the Duke of Buckingham, and the farmer was literally convicted by the Duke himself, in the Duke's private house, at the

instance of one of the Duke's keepers, and on the evidence of another of his keepers. The Duke refused to permit the defendant to bring in an attorney to help in the defence, and would not even allow a friend to take notes. The latter was told that if he uttered one impertinent word there was a constable in the room to take him to the stocks.

Sir S. Walpole quoted in S. & B. Webb The Parish and the County p.599.

Evidence of particular cases such as those cited above is difficult to obtain because of the inaccessability of Petty Sessions records, and the obvious reluctance of magistrates to record irregularities. However, it is clear from the novels of Swift, Fielding and others, together with the growing popular discontent towards the way in which magistrates enforced the game laws, that the above cases were not isolated incidents.(30) This feeling was expressed vividly by Brougham when he said:

There is not a worse constituted tribunal on the face of the earth, not even that of the Turkish Cadi, than that at which summary convictions on the Game Laws constantly take place; I mean a bench or

brace of sporting magistrates.

Quoted in J.L. & B. Hammond The Village Labourer
p.134

The class nature of the magistrates' enforcement of the game laws was so naked that even an apologist such as Tobias cannot avoid acknowledging it.

These severe laws were usually enforced by the local gentry, in their capacity as justices of the peace. Justices had more freedom of action against poachers than against most offenders. Some writers regard the game laws as class legislation in its most extreme form. They point to the fact that the magistrates were able to enforce the laws even when the crime was said to have occurred in their own preserves or in the preserve of their neighbours. It may reasonably be thought that a landowner anxious to protect the rights of property would be fairly easy to convince that an adequate case had been made against those brought before him on the charge of poaching.

J. Tobias Crime and Police in England 1700-1900
p.23.

Although the class nature of magistrates' justice in the 18th

is revealed most clearly in their enforcement of the game laws, this was not the only way in which it was manifest. In the late C18th and early C19th, as urban areas began to expand more rapidly, the increased flow of pedestrian traffic along certain footpaths became a nuisance to the landowners concerned and they frequently responded by blocking up footpaths. Initially they took such actions without any legal sanctions but an Act of 1815 formalised this power by enabling any two magistrates to close any footpath which they deemed unnecessary.

The Justices, in fact, did not scruple to give away the public rights-of-way at the request of their neighbours; they would even go so far as to make such orders in the case of footpaths across their own estates. It became common - so it was gravely asserted in the House of Commons - for one magistrate to say to another, 'Come and dine with me: I shall expect you an hour early as I want to stop up a footpath'.

S. & B. Webb The Parish and the County p.601.

Similar observations have also been made about the ways in

which magistrates used their authority in the building and repair of roads and bridges. David Williams cites the example of the suspension bridge at Llandovery, completed in 1832, which was not near a main road and which, in the opinion of at least one contemporary, had "no purpose other than the convenience of magistrates living in the neighbourhood." (31) The Webbs cite another example involving Robert Peel the elder who attempted to divert the road from London to Liverpool to run closer to his own home at the expense of the town of Tamworth. (32) Although this particular attempt was frustrated by a counter petition from the residents of Tamworth, the above examples nevertheless illustrate the way in which magistrates attempted to use their position to further their own interests.

The above discussion, again, reveals the transitional nature of the legal forms that emerged in the 18th. The magistrates' courts, at the lower levels of the criminal justice system, exhibited many of the same characteristics as the higher courts discussed by Hay. Magistrates' justice was

largely beyond the control of central government and it involved an authoritarian, direct and naked protection of the property rights of the gentry. This system reflected the continuities with the magistracy's absolutist past and it was opposed by those groups, significantly representatives of the embryo bourgeoisie (eg. Brougham), whose property was not protected by this legal form and who objected in principle to direct domination. We will see, in later chapters, that, as this group grew in strength, they were able to mount a successful challenge to the rule of the gentry, but, for the remainder of the C18th and part of the C19th, magistrates' courts survived in this transitional form.

The Eighteenth Century Magistracy As A Transitional Form Of Class Rule

The transitional nature of the eighteenth century magistracy can further be seen in their policing role which also displayed continuities with the pre-Civil War period, creating its own set of contradictions. Magistrates continued to enforce the poor law and the laws against vagrancy, which were

clearly designed to regulate the supply of labour and keep down the level of rural labourers' wages(33) and, on occasions, this led them to a suppression of the emergent working class. Thus, for example, when discussing the Vagrancy Laws, the Hammonds say that:

They were used to put into prison any man or woman of the working class who seemed to the magistrates an inconvenient or disturbing character. They offered the easiest and most expeditious way of proceeding against anyone who tried to collect money for families of locked-out workmen, or to disseminate literature that the magistrates thought undesirable.

J.L. & Barbara Hammond The Town Labourer p.49.

However, magistrates' exercise of their public order function was more complex than this might suggest. This can be seen most clearly in the relations between magistrates and the C18th "crowd". The C18th witnessed a number of food riots throughout the country which, until recently, historians have tended to portray as irrational actions. Recent work by Rude, Hobsbawm and, particularly, Thompson has shown that, far from

being mindless, food riots reflected the attempts of C18th labourers to protect traditional customs regarding the sale of food - especially grain and bread.(34) Seen in this way, the C18th food riots reflect the conflict between traditional customs and laissez-faire capitalist market principles, with the crowd protecting the former and capitalist farmers trying to operate according to the latter. Insofar as these riots constituted a problem of public order, magistrates were inevitably drawn in as mediators of this conflict and it was common for them to side with the crowd against engrossers, forestallers, etc..

In this tradition we find a London magistrate in 1795 who, coming on the scene of a riot in Seven Dials where the crowd was already in the act of demolishing the shop of a baker accused of selling light-weight bread, intervened, seized the baker's stock, weighed the loaves, and finding them indeed deficient, distributed the loaves among the crowd.

E.P. Thompson The Moral Economy of the English Crowd p.107.

Other historians have shown that magistrates were prepared to

support the 'crowd' even when this went against the directives that they received from central government.

Scarcity sometimes revealed a conflict between the local authorities and the central government. ... in these shortages the central government was often acting against the natural inclination of local magistrates in emphasising the free circulation of grain. The local authorities could be prevented by legislation from interfering with the movement of grain about the country, but little could be done to prevent local magistrates from intervening in the marketing of food in their own area. Thus in many towns the local magistrates took the initiative in arranging a reduction of prices with the food dealers, as for example at Banbury in 1800. In the same year at Nottingham it was reported that the J.P.s were considering taking over the corn trade from the dealers. At Brandon in 1816 the magistrates agreed to press the corn dealers for a reduction in prices. In other places the authorities revived the medieval instrument of the assize of bread, which fixed bread prices in relation to the cost of grain. In places where it had ceased to be observed, a number of exemplary prosecutions were undertaken. Similarly, the legislation against monopolistic practices was revived and prosecutions undertaken. In 1800 the most important trial was

that of John Rusby, a London corn dealer before Lord Kenyon, for regrating.

J. Stevenson Food Riots in England 1792-1818 p.61.

And again:

In the 1790s the authorities of Cardiganshire and Pembrokeshire sought to prevent violence by attacking the root of popular unrest. They gave severe warnings to forestallers and regrators, and placed restrictions on the trade in corn. This policy ran directly counter to that adopted by the government, and the Pembrokeshire magistrates were severely criticised by the Duke of Portland. Another attempt to interfere on the side of the lower classes came in 1831, when anxious Swansea magistrates enforced the payment of wages in money, not goods.

D.J.V. Jones Before Rebecca p.168.

There are a number of reasons why magistrates acted in this way. It can be explained in part by the fact that, in many instances, they had little choice. As Thompson says, one of the problems of the weak state - the source of J.P.s powers in this period - was the licence of the crowd which left indiv-

idual magistrates vulnerable to personal attack.(35) Sometimes this took the form of written threats(36) and at other times it involved attacks on magistrates' property. Thus, when discussing an incident in Sheffield, Thompson says:

In 1792 the two magistrates lived out of town, one at a distance of fourteen miles the other having made some efforts during the riots last year relative to some enclosures, the populace burned part of his property, and since that time he has been very little in the country.

E.P. Thompson The Making of the English working Class p.165

And, Stevenson, when discussing the Gordon Riots, says:

The mob also turned its attention to the justices involved in arresting men for the attacks on the Sardinian chapel. The houses of Mr. Rainforth in Clare Street and of Mr. Maberly, in Little Queen Street were attacked and demolished; at midnight a mob attacked George Saville's house in Leicester Square, damaging the windows, railings and some of the furniture before the Guards intervened. Burke's house too was threatened...

About five o'clock Justice Hyde read the Riot Act

and ordered the Horse Guards to disperse the crowds outside parliament. One of the crowd hoisted a red and black flag and shouted 'To Hyde's house a-hoy', and the crowd surged off to St. Martin's Street where Hyde's house was located and turned its furniture into the street where it was devoured by half a dozen bonfires.

J. Stevenson Popular Disturbances In England p.80

Occasionally, magistrates, themselves, suffered physical abuse from the crowd.

In these circumstances justices of the peace inevitably became the target of intimidation. Some received threatening letters, while others had more humiliating and frightening experiences. As we have seen a Merioneth justice who was trying to execute the act for raising men for the navy was forced to wear wooden shoes. At Denbeigh, Abermule (Montgomeryshire), and in the Rhymney Valley, magistrates were imprisoned for several hours and forced to grant concessions. The authorities at Denbigh even had to pay the lower orders for their loss of time. Worse still rioters sometimes injured justices. Richard Watkin Price was assaulted on his way to quell a disturbance at Bala in May 1815, and Edward Frere was clubbed during the strike of 1822.

It was fear of such attacks which made magistrates reluctant to read the Riot Act without the presence of a considerable body of constables or soldiers.

D.J.V. Jones Before Rebecca p.172

Even if magistrates were willing to act against the crowd they faced the possibility that they would be confronted with legal action resulting from their handling of riots. As Radzinowicz(37) has pointed out, magistrates were in a legal double bind. On the one hand, the common law imposed a strict duty upon them to suppress riots and they were criminally liable if they did not do so. On the other hand, if their actions resulted in the death of any one not guilty of participating in the riot, they might find themselves - like Samuel Gillam in 1768 - defending a murder charge. A common response to this dilemma seems to have been for magistrates to retreat from the trouble spot entirely or, failing this, to do nothing. By following this course they were less likely to be implicated and, even if they were, it may have been preferable to be tried for neglect of duty than to face the hostility of the crowd and/or a possible murder charge.

The historical evidence suggests that both the hostility of the crowd and the possibility of legal action were significant factors influencing magistrates' actions but this does not explain the fact that magistrates often took positive action in favour of the crowd. It is conceivable that such actions were conscious attempts to reinforce the complex web of mutual obligations that existed between the rural labourers and the gentry, thus strengthening the authority of the latter. However, although magistrates' support for the crowd may well have functioned in this way, there is no evidence to suggest that it was based upon a calculated self-interest. It would seem more likely that they were acting on the basis of more genuine motives in support of causes that they considered to be just. They were a class that had been moulded in a period before the advent of laissez-faire capitalism which was a philosophy as alien to them as it was to their labourers. Although the gentry enjoyed a privileged position within 18th century society, they shared many of the same values and traditions as their labourers. For much of the 18th century the gentry were united with their labourers in opposing both

laissez-faire market principles and the new industrial bourgeoisie. They refused to allow men of trade to sit on the county benches(38) and, on occasions, magistrates were prepared to ignore their responsibility to maintain order and actually encourage 'the crowd' in acts of intimidation against dissenters and radicals. This is illustrated in the following account of the Priestley Riots.

At the very least the magistrates showed an unwanted incompetence. There are numerous earlier testimonies to the efficiency, reliability and zeal of "Justice" Carles as the most active local magistrate. Faced with the probability of a riotous outbreak on 14th July he allowed himself to get drunk, and intervened in a half-hearted manner only when it was too late. He then washed his hands of the whole affair. Still more serious charges may be made. Carles and Spencer were present when the mob first gathered at the Royal Hotel to hiss the bastille diners, and made no effort to caution or disperse them. Although they acted to protect the Hotel in the evening, they did so merely by directing the rioters to the Unitarian meetings. This accusation was made by deponents against all three magistrates, both severally and jointly. Brooke, who is even said to have bribed the

mob-leaders to go to the New Meeting, had adequate private and personal reasons for so doing, apart from any public antipathy towards the Unitarians; his house stood next to the Hotel and was thus in imminent danger from the lawless crowd. This may help to explain why his clerk, Matthew Jones, boasted in 1793 that he, Jones, had personally led the mob to the New Meeting on 14th July.

There is general agreement among witnesses that the magistrates promised the rioters protection as long as they restricted their attacks to the meeting-houses and left persons and property alone, and that the promise was kept. When T.W. Hill, one of Priestley's congregation, siezed one of the rioters outside Fair Hill on the night of 14th-15th July and took him to gaol, the prisoner was promptly released, the keeper informing Hill that he had orders to take no prisoners that night. The following morning, when George Humphreys applied to Spencer for protection for his house, he was met with abuse and advised to "go home and burn your seditious papers or it will be the worse for you." According to Whitbread, while the riot was still in its early stages the magistrates turned down an offer of assistance from a recruiting party then in Birmingham and dismissed them. Two witnesses agree that Spencer, or Spencer and Carles, released one of the looters who had been seized while attacking Ryland's house between 1 and 2 p.m. on 15th July.

Further affidavits support the general charge that Carles and Spencer remained on affable terms with the rioters right up to the arrival of the military, and the specific accusation that even as late as 9 or 10 p.m. on 17th July Carles urged the rioters in Thomas Street "not to leave those presbyterian dogs a place standing." It seems probable, however, that this sympathy was only apparent, and tactical, for other witnesses agree that Spencer tried to get the rioters at Priestley's house to desist at 5 or 6 a.m. on the 15th, and that Carles and Brooke both made attempts to disperse the crowd around Ryland's house the same afternoon. They had, Carles is alleged to have said, "gone past what they were ordered.(39)

R. Rose The Priestley Riots of 1791 pp.80-82

This hostility towards the principles of laissez-faire and its proponents also lies behind the sympathetic actions of magistrates towards 'food rioters' and workmen. For example, when discussing the seamen's strike on Tyneside in 1792, Stevenson says:

Often a genuine desire to find a settlement within the local community helps to explain the reluctance of magistrates to call on outside help, hence it was

usually only when affairs clearly got out of hand that the troops were called in. ... Workmen could often call on a greater degree of sympathy from magistrates and local gentry than has sometimes been allowed by historians determined to see in these conflicts a class dimension which serves to obscure the complexities of the relationships involved.

J. Stevenson Popular Disturbances In England
1700-1870 p.132.

The values and customs which the crowd were attempting to protect were part of a traditional culture, not based upon capitalist private property, in which the gentry shared and it is likely, therefore that, at least occasionally, "a conciliatory policy was not forced upon the justices but was the result of their sympathy with the rioters." (40)

Towards the end of the C18th and in the early C19th, we can detect the beginnings of a change in the way that magistrates exercised their public order function. During this period the beginnings of an organised working class coupled with the revolutionary climate abroad and the intrusion, in some areas, of manufacturers onto the Bench drove the gentry closer to the

industrial bourgeoisie.

But at the moment when the men's grievances were loudly and effectively voiced, at that moment also they threatened the values of order. The old-fashioned squire might sympathise with a famished stockinger who appeared as a passive plaintiff at his door. He had no sympathy at all with secret committees, demonstrations in the streets, strikes, or the destruction of property.

E.P. Thompson The Making of the English Working Class p.596.

The emergent working class constituted a more serious threat to both the property and the social position of the gentry magistrates than did the rural labourers. Not only did they not receive the same sympathy but they were clamped down upon by magistrates in a variety of ways. 'Undesireables' were punished under the Vagrancy Laws(41); working class activists received heavy sentences in the magistrates' courts(42); publicans were pressured not to allow radical groups to use their rooms(43), and; political meetings were met with force.(44) Perhaps, more significantly, legislation which was

supposed to apply equally to both masters and men (such as the Combination Laws and the Truck Acts) became redundant because of the magistrates' refusal to implement it. According to the Hammonds, magistrates took it for granted that if the masters would not obey these laws then there was nothing that could be done to enforce them.

When the trouble became serious they met, not to put the Truck Acts into operation against the masters, but the Vagrancy Acts against the men. As they could not persuade the masters to obey the law, they sent them to prison for trying to make them do so.

J.L. & B. Hammond The Town Labourer p.46.

This is not to say that there was a sudden or total withdrawal of sympathy in the late C18th and early C19th. There were still instances during this period - such as the attack on Arkwright's factory in 1779(45) - when workers received some support from local magistrates. Rather, the attitudes of the authorities were split between those who were clearly opposed to the working class and those who still retained a hostility towards laissez-faire capitalism and a sympathy with

their social subordinates who opposed it.(46) However, these developments are indicative of the more profound changes that were to take place later in the C19th. The growth of industrial capitalism was both undermining the rule of the gentry and strengthening the position of the industrial bourgeoisie. The growth of an organised working class was beginning to undermine the network of informal relationships between the gentry and their subordinates which formed the basis of their authority and the bourgeoisie were beginning to challenge the legal and political forms that constituted the rule of the gentry. This process was by no means complete by the late C18th but we can detect the start of a change that was to result in the radical transformation of the magistracy.

Summary

In this chapter, we have seen that the magistracy emerged after 1688 as a still more powerful force than they had been before the Civil War. This was not a simple linear development of the growth of their powers that had begun under the

Tudors and Stuarts. Although the powers that magistrates had in the C18th were similar to those that they had been granted in their earlier history, the functions of the magistracy underwent a subtle but, nonetheless, significant change. Whereas they had previously constituted part of the absolutist state, they now formed an important element within the rule of the gentry. Just as this was a transitional period in the development of British capitalism, so, too, was it a transitional period in the form taken by the magistracy. Although the gentry were engaged in capitalist agriculture, they were a class that had been formed under centuries of feudalism. This was important in two major respects. Firstly, the legal and political forms that they developed were closely related to the forms that had existed under absolutism. Thus, although their rule was geared to the protection of property interests, it offered little protection to the property of capitalist farmers and the nascent bourgeoisie and it took the form of a direct rule based upon privilege, terror and obligation. Secondly, the gentry remained opposed to the principles of laissez faire capitalism and acted, particularly in

their policing role, to protect traditional customs, for example, in the sale of bread and grain.

This was to lead the gentry into conflict with the emerging industrial bourgeoisie, whose interests were generally not well served by gentry rule and who, with their commitment to a liberal philosophy based upon laissez faire economics and indirect, representative government, were opposed in principle to the legal and political forms developed by the gentry. In the C18th, industrial capitalism was still in its infancy and we can only detect the beginnings of the changes that were to come, but this conflict between the bourgeoisie and the gentry was to lead to a fundamental transformation of the English magistracy.

MAGISTRATES AND LOCAL GOVERNMENT

Introduction

In Chapter Four we have seen that, during the C18th, Justices of the Peace acquired a range of powers and an autonomy from central government which enabled them to combine judicial, administrative and executive functions in a way which made them the virtual rulers of the counties. During the course of the C19th, the magistracy underwent a transformation in which it was stripped of most of these powers and emerged in its modern form as a lower court of criminal justice. In this and the following two chapters we will examine this transformation in some detail in an attempt to offer a better understanding of the modern magistrates' court and the nature of magistrates' justice.

In this chapter we will analyse the process through which local government was taken out of the control of the magistrates and handed over to elected councils and other bodies.

Our argument will be that this transference of power from the unrepresentative magistracy to the nascent organs of the modern state can only be fully understood in the context of the emergence of industrial capitalism. This is not to suggest that it was simply the product of a 'logic of capitalism' but rather, as we will see, that it was the outcome of a struggle between the bourgeoisie and the gentry.

The End Of An Era

The process of stripping magistrates of their administrative functions was contested and drawn out and it lasted for most of the C19th but it began fairly suddenly in the second quarter of the C19th. Between 1828 and 1835 a number of Acts were passed which, when taken together, mark the end of magisterial dominance of local government. During this short period magistrates powers to control the sale of liquor were curtailed(1); responsibility for inspecting cotton factories was transferred to the Home Office(2); they lost all authority over the administration of highways(3); their administration of prisons was brought under the stricter control of the Home

Office(4); the Poor Law Amendment Act (1834) established elected authorities (Boards of Guardians) to replace the magistracy in the supervision of vagrancy(5), and; the Municipal Corporations Act (1835) transferred responsibility for all aspects of local government to elected councils in the boroughs. In addition to this legislation transferring administrative powers from magistrates to other bodies, a number of Acts were passed creating new administrative functions in which the magistracy was completely ignored.(6) This set the pattern for the remainder of the 19th and as successive reforms were passed creating new local government functions, it was no longer usual to place responsibility for their administration with magistrates. This was devolved to the borough councils, Boards of Guardians, Government Inspectors, or other special bodies beyond the influence of the magistracy.

In their discussion of this period, the Webbs argue that these changes resulted from the growing unpopularity of the magistracy in the first part of the 19th. They argue that in

addition to the widespread dissatisfaction with the Middlesex 'trading justices', who were becoming increasingly corrupt, the magistracy was disliked even in its honest administration. This discontent derived from a number of quarters. The Tories and their brewer friends objected to the regulation of inns and alehouses as an interference in their capital investment; ratepayers objected to attempts to obey the injunctions of parliament in building new prisons, asylums and bridges because these projects added to the expense of the county rates; labourers objected to the efforts to limit the generosity of the Overseers of the Poor, and; both bourgeois Radicals and labourers objected to the arbitrariness and severity with which the game laws were administered.(7) As a result, the magistracy was "individually and collectively denounced on every platform and criticised in every newspaper. By one powerful party they were threatened with annihilation."(8)

According to the Webbs the growing dissatisfaction with the magistracy reached a crescendo in the 1830s and this was the

major factor underlying the stripping of their administrative functions at this time. However, although we may accept that criticism of the magistracy increased during this period, it does not adequately account for the nature of the changes that occurred. Firstly, as the Webbs themselves point out, the magistracy emerged from this period with less actual change than other local governing authorities of the time.(9)

Yet against the institution of unpaid justice of the peace, the method of his appointment, or the comprehensive powers recited in the ancient Commission of the Peace, no adverse action was taken, even under the Reform Ministry.

S. & B. Webb The Parish and the County p.605.

Thus, although many of their administrative powers were transferred, the institution of the Justice of the Peace remained unchallenged. Given that the Webbs argue that the undemocratic nature of the appointment of the magistracy lay at the root of popular discontent, the fact that this institution remained not only unchanged but unchallenged implies that the discontent with the magistracy was not as strong a

force for change as the Webbs suggest. Secondly, and more importantly, the Webbs fail to place these changes within the context of the changing nature of British society in the early C19th. In the previous chapter we have seen that the powers that the magistracy acquired in the C18th were an important element in the form of rule that emerged in early (agrarian) capitalism. By the late 1820s and 1830s, the class formation was changing bringing new ideologies which resulted in a call for new legal and political forms. In this period we can see the champions of the new order (sometimes with the support of the industrial working class) begin to stand up and challenge the defenders of the old order. The loss of magistrates' local government functions reflects the changing balance in the struggle between these two groups. The replacement of the undemocratic rule of the gentry with new forms based upon the twin principles of (a) no taxation without representation, and (b) the separation of judicial and executive powers represents a series of victories for the industrial bourgeoisie. Osborne suggests that the New Poor Law (1834) was a turning point in the history of the magistracy because it marked the

Great Divide between their legal and administrative functions(10) but the Municipal Corporations Act constituted an even more fundamental attack on the rule of the gentry. When discussing this Act, the Webbs suggest that, although the 1832 Reform Act "struck at them as citizens of state", the Municipal Corporations Act "struck at their local predominance, their social superiority, their personal authority, and their power of dealing with local rates."(11) In view of the importance of this Act both in terms of the demise of the old order and the loss of magistrates' administrative powers we will examine the passage of this measure through Parliament in detail to illustrate the way in which the struggle between the bourgeoisie and the gentry resulted in new political forms.

The 1835 Municipal Corporations Act

The Bill that was introduced, by Russell, on 5th June 1835 proposed to abolish the old corporations for 183 of the boroughs in England and Wales.(12) In their place were to be created town councils elected by all ratepayers who had paid

their poor rates regularly for at least three years. These councils were to be responsible for the administration of local government within the boundaries of their borough and, in those boroughs that were granted a Commission of the Peace, they would be responsible for nominating magistrates to the Home Secretary. The only concession made to the corporations was that magistrates were to have a share in the control of the police. The Bill proposed to create Watch Committees which would be constituted of one half magistrates and one half councillors.(13)

Although this Bill was approved by the House of Commons the House of Lords passed a series of debilitating amendments contradicting the initial aims of the Bill. They passed: an amendment designed to preserve the property rights of freemen;(14) an amendment which imposed a property qualification for councillors;(15) an amendment to increase the proportion of councillors exempt from election (i.e. aldermen) to one quarter;(16) an amendment to allow existing magistrates to sit indefinitely;(17) an amendment allowing town

clerks to hold their office for life,(18) and; a new clause which stated that only members of the established English Church would be able to vote on the distribution of Church patronage.(19) The Bill was returned to the Commons in its mutilated form and eventually a compromise was reached whereby the property qualification for councillors remained, the proportion of aldermen remained at one quarter but they were to be elected for six year periods only, and existing magistrates and town clerks were not allowed to hold their office.

Thus, the 1835 Municipal Corporations Act was a compromise measure which, whilst transferring the local government functions of borough magistrates to elected councils, retained a role for the old establishment. Many commentators on this period have seen it purely in party political terms as an attempt by Russell to challenge the Tory monopoly of control in the boroughs. There can be no doubt that this was one effect of the Act. Prior to the 1835 Act, the vast majority of boroughs in England and Wales were controlled by the Tories whereas the new councils were elected by the local ratepayers

and (at least in the more industrial areas) were composed of Whig/Liberals. Moreover, Russell appears to have used his position as Home Secretary to increase the number of Whig magistrates in the new municipalities. Thus, in a Commons debate, Peel (the leader of the Tories in the Commons) cites examples from Guildford, Wigan, Rochester, Coventry, Leicester, Plymouth and Bristol to show how Russell exercised party bias in the appointment of borough magistrates.(20) Russell countered by referring to the difficulties of determining an individual's political allegiance and by saying that he believed that the people he had appointed would not allow their politics to prevent them doing their duty as magistrates. Other M.P.s who spoke in support of Russell also point out that Peel had been partisan when he was Home Secretary and they accused him of only "caring about justice, at the moment when the right hon. baronet finds it impossible to preserve that system of Tory domination over the people which he has so long exercised." (21) Nevertheless, neither Russell, nor his supporters, denied the fact that he had appointed a disproportionate number of Whig/Liberal magistrates and it is

political opportunism of this kind that has led some commentators to imply that party political motives were the major force underlying the Municipal Corporations Act. However, if the Bill was simply a piece of political manipulation by Russell, we would have expected a concerted opposition from the Tories but this was not the case. Although there was strong opposition to the Bill in the House of Lords, in the Commons disagreement was confined to details such as whether freemen ought to be allowed to retain their traditional privileges and whether responsibility for licencing ale-houses should be in the hands of magistrates or town councils.(22) The Tories in the House of Commons supported both the principle of elected municipal councils and the need for local government reform. (See below)

A second common explanation of the Municipal Corporations Act has been that it was motivated by a desire to stamp out corruption in the administration of the boroughs. Again, there is certainly some evidence to support this interpretation, most notably from the Select Committee on Municipal Corpor-

ations that reported in 1833. The Committee's report provided abundant evidence of partisanship, corruption, and loss of public confidence in the corporations. Consider the following evidence taken from Mr. Herbert (a magistrate in Ansty, near Coventry).

888. Is the management of the corporation generally respected by the inhabitants of the city of Coventry? - I believe not.

889. Upon what grounds? - The management of their affairs is entirely within their own vortex, so that nobody knows anything about it; nobody can tell anything about their affairs but one of their own body; it is so close and compact a concern, it can be investigated only by those who know its concerns.

890. Is there any feeling with respect to the manner in which justice is administered? - The impression is that the magistrates are great partisans; and we should say speaking broadly upon the subject, that a man who is not in their party would do better to hush up any quarrels that he had than go before them. I myself do not choose to go before them, and therefore I cannot charge them with injustices to myself; in fact, I have no occasion; I prefer, if I have a little difficulty with my people, to settle it than to litigate it.

891. Is that from a feeling that you entertain, that the administration of justice is not likely to be satisfactory? - It is certainly not; I have had no occasion but in two instances to trouble them at all; in both cases I was absent from Coventry, and I have no reason to complain of their decision.

892. Can you speak of the general impression upon that point? - The general impression is that from their being so implicated in party proceedings, that an opponent is better away.

893. What do you mean by party feelings? - Political feelings.

Report From The Select Committee on Municipal Corporations, 1833, p.38

A little later Mr. Herbert adds:

The impression upon my mind is, that the general feeling against the magistrates was founded upon their partial conduct in the distribution of gifts; and when the magistrates act partially in the distribution of money in their hands as trustees, it destroys in some measure the confidence of the public in applying to them for justice.

Report From The Select Committee on Municipal Corporations, 1833, p.39

This evidence of partisanship and public dissatisfaction is typical of the evidence presented by the majority of the boroughs. When introducing the Bill in the House of Commons, Russell refers to this Report and he uses the evidence of corruption to support the case for a more democratic form of municipal government. As we will see shortly, this was also a factor behind Peel's support for this measure but there is a major problem with those accounts of the passing of the Municipal Corporations Act which explain it purely in these terms in that they can not explain why there was a desire to eliminate corruption. These histories imply that the answer to this question is obvious - it was part of a general process of 'civilization' leading to the best possible democratic political system that it is assumed exists in modern Britain. From this viewpoint, the creation of elected borough councils in place of the self-recruiting, corrupt corporations is simply one stage in this apparently inevitable process. As such, the question of why leading politicians should wish to abolish the old corporations does not arise. They are the 'great men' of history, men of principle with the strength of

purpose to enact reforms. However, if it was an inevitable development, why was there so much resistance to it in the House of Lords? Within this framework it is not possible to explain the conflict that arose around this issue other than perhaps in terms of an innate conservatism attempting to block the march of progress. It is assumed that the transference of local government to elected bodies was a general good which served the interests of everybody. However, this rides roughshod over the nature of the class conflict between the industrial bourgeoisie and the representatives of the old order.

Following the 1832 Reform Act, the composition of the House of Commons altered with an influx of industrialists and other representatives of the bourgeoisie. Their interests were not served by the political forms that excluded them from local government and they pressed for new forms based upon bourgeois principles. This led them into conflict with the representatives of the old order who clung to the traditional principles of government. The basis of this conflict was spelt out by the 1833 Select Committee. Their report criticises the

undemocratic principles on which the old corporations were based.

The principle that prevails of a small portion of Corporators choosing those who are to be associated with them in power, and generally for life, is felt to be a great grievance. The tendency of this principle is to maintain an exclusive system, to uphold local, political and religious feelings, and is destructive of that confidence which ought always to be reposed in those who are entrusted with control, judicial or otherwise, over their fellow citizens.

Report From The Select Committee On Municipal Corporations, 1833, p.iv

It then goes on to recommend that they should be replaced by more responsible bodies:

Your Committee are further led to infer that Corporations, as now constituted, are not adapted to the present state of society; the Corporate Officers are not identified with the Community, who have rarely any influence in choosing them, and have no control over their proceedings; Corporate Officers, even the highest rank, are not always objects of desire, and

are likely to be less so now that the political influence of Corporations has been much diminished. To make Corporations instruments of useful and efficient Local Government, it seems to be essential that the Corporate Officers should be more popularly chosen; that the Officers should be accessible to all that have entitled themselves by their good conduct to good opinion and confidence of their fellow-citizens; that their proceedings should be open and subject to the control of Public Opinion; and that it should be felt by the Community that the maintainance of Order, and the equal administration of Justice in all things, depend on the energy and principle of the Corporate Officers.

Report From The Select Committee On Municipal Corporations, 1833, p.vi

The principles behind these recommendations were more closely identified with the Whigs, but the Tories were also able to accept them when applied to the boroughs partly because of the feeling that borough justices were of mean degree and, therefore, unfit but, also, because of their growing concern about the ability of the old corporations to preserve order. The Webbs suggest that this concern reached a crescendo following the riots in Bristol and a series of other towns

governed by Close Corporations in 1831(23) and it is clearly evident in Peel's speech in favour of the Bill:

...if in any case corporate privileges are found to be an obstacle either to pure administration of justice, or to the establishment of a good system of police and general government, we are willing to admit, that the regard for the special privileges ought not to bar the consideration of whatever may conduce to the authority of the law, and to the maintainance of public order. We therefore, shall offer no opposition to the second reading of this Bill. Sir, I cannot contemplate the condition of some of the great towns of this country, and witness the frequent necessity of calling in the military in order to maintain tranquility, without feeling desirous that the inhabitants of such towns should be habituated to obedience and order through the instrumentality of an efficient civil power, and a regular and systematic enforcement of the law. I believe that you could not establish a system of good government in the populous towns and cities of this country, retaining at the same time every existing privilege and practice of the corporate bodies as at present constituted; and I think it much better to place those towns under the exclusive control of a corporate authority, invigorated and adapted to the present state of society, than to

leave the ancient Corporation precisely where we find it - devolving at the same time real power, and almost all the functions of administrative authority upon some new body constituted on a different and more popular principle.

Parliamentary Debates, Vol.28, 15th June 1835,
cc.831-832

Thus, although for slightly different reasons, both parties in the Commons supported the bourgeois principle of responsible government when it applied to the boroughs. The main opposition came from the aristocratic representatives of the gentry in the House of Lords who were not prepared to accept any interference with traditional privileges. The main spokesmen against the Bill were the Duke of Newcastle and Lord Lyndhurst. Newcastle's speeches were filled mainly with rhetoric against the way in which petitions against the Bill had been got up and his proposed response was to simply throw the Bill out.(24) It was Lyndhurst who adopted the more subtle approach of passing a series of debilitating amendments. As we have seen, this tactic enabled Lyndhurst to win a number of concessions from Russell but the outcome was nevertheless a

victory for the bourgeoisie. The Webbs describe it as a victory which established "the middle class shopkeeper, miller, or merchant" in power.(25) This is certainly true but the bourgeois victory lay not simply in changing the personnel in charge of local government but also in changing its form. The Municipal Corporations Act not only embodied the principle of responsible government, but also, by taking away magistrates' administrative powers, it facilitated the separation of judicial from administrative and executive powers.

Thus, we can see that the Municipal Corporations Act was closely linked to the growth of industrial capitalism. This is not to say that this form of local government was in any way an inevitable product of the logic of capitalist social relations. Rather, it was the outcome of a struggle fought out by specific groups within the political arena formed by the particular social formation that existed in Britain in the mid-1830s. The bourgeoisie, who fought to replace existing institutions with a new form of local government more consistent with their own class interests, owed its strength

to the expansion of industrial capitalism, but the gentry remained a powerful force and the Municipal Corporations Act can be seen as a compromise between the two groupings. The nature of this compromise appears in the concessions that Russell made to the Lords. These may seem to be relatively insignificant in comparison to the acceptance of the bourgeois principles embodied in the Municipal Corporations Act but the balance had not yet swung as far in the direction of the bourgeoisie as the outcome of this particular compromise might suggest. This Act only applied to the municipal boroughs where the justices were less likely to belong to the gentry and it therefore constituted less of a challenge to their position. In the next section, we will see that, for most of the C19th, the gentry remained sufficiently powerful to prevent the extension of the principle of representative government to the administration of the counties.

County Councils

Although the Municipal Corporations Act can be seen as a victory for the bourgeoisie, it was only one stage in the

longer struggle against the gentry's control of local government. In addition to the Lord's amendments, the impact of the Bill was further limited by the fact that, although a majority of the boroughs covered by the Act had been granted a separate commission of the peace, county magistrates retained the right to exercise concurrent jurisdiction within the boroughs.(26)

In any case, the Act only applied to those boroughs that had been granted a Royal Charter. New industrial towns as large as Manchester and Birmingham were not covered by the Act(27) and neither were large areas of the industrialised counties.(28)

Thus, even in those boroughs that were included in the Act, the gentry (in their role as county magistrates) retained some powers. Outside of these boroughs, the administrative powers of county magistrates had been reduced by the Poor Law Amendment Act (1834) and the other measures mentioned earlier in this chapter, but they nevertheless retained control over the administration of the counties.(29)

Following the passing of the Municipal Corporations Act, the struggle over local government shifted to the counties but

this proved to be a far more difficult battle to win. The first skirmish occurred in the summer of 1836 when Hume introduced a County Rates Bill which proposed that J.P.s would lose all control over the collection, assessing and spending of county rates, and that these powers should be transferred to county councils elected by all ratepayers. In addition, the Bill also proposed to transfer all of the administrative functions of county magistrates - including their power to appoint police constables - to the new county councils. Finally, the Bill proposed that the new councils should have the power to nominate people of their choice as J.P.s, even if they did not satisfy the property qualification.(30) In his speech asking for leave to bring in the Bill, Hume said:

The object of the Bill is to separate the judicial from the financial affairs of the counties of England and Wales, and to authorise the rate-payers of counties to elect a certain number of representatives to form a County Board for the assessment, levying and administration of the county rates, and to perform those duties having reference to the financial expenditure of the counties, now executed by the magistrates in Quarter Sessions. At present

there is not sufficient check on the management of the county rates which there ought to be, and which the rate-payers have a right to demand. This is owing to the inherent defects of the present system - the principle of which is, that those magistrates who levy and direct the expenditure of rates are independent of those who pay them. ...

What I complain of is that there is not that wholesome check and control over the taxes in counties which has been lately extended to the Municipal Institutions of the county. A majority of this House and the country has approved of the Bill for allowing the inhabitants of corporate towns and cities to elect persons to control the municipal taxation, and also to recommend magistrates for their respective cities and towns, and I ask the same privileges for the counties.

Parliamentary Debates, 21/6/1836, Vol.34, c680

As we have seen, the principles embodied in this Bill - the separation of judicial and executive powers and ratepayer control over the expenditure of the rates - had been accepted in relation to the boroughs in the previous year. In his County Rates Bill Hume was attempting to extend the principles of the Municipal Corporations Act to county govern-

ment. However, although the Commons had offered almost unanimous support for the Municipal Corporations Act, Hume's Bill was rejected by the Tories and only received muted support from the Whig front bench.(31) Genuine support for the Bill within the House of Commons was restricted to a handful of radical utilitarian M.P.s - notably Ewart and Roebuck(32) - and, consequently, it was thrown out of the Commons at its second reading. During the next half century a series of further attempts were made to introduce a measure of local government reform in the administration of the counties all of which met with a similar fate.

Hume tried, both in 1838 and 1839, to introduce a modified version of the 1836 Bill. These County Rates Bills proposed the creation of county councils for the sole purpose of regulating county rates, leaving the other administrative powers of magistrates intact, but they too were thrown out by the Commons.(33) In 1849, Hume introduced a County Rates and Expenditure Bill which also proposed to create county councils for the sole purpose of administering the rates but, this

time, Hume suggested that they should be elected, not by the ratepayers directly but, by the Boards of Guardians. "It was proposed that each union should elect one of its guardians to form a county board, to which one magistrate would be added for every two guardians so elected".(34) This Bill was also rejected at its second reading.(35) In 1850, Milner Gibson introduced a County Rates and Expenditure Bill which was almost exactly the same as Hume's 1849 Bill. This Bill was read a second time and referred to a Select Committee but it was not discussed again in the House of Commons.(36) In 1851 Milner Gibson introduced another County Rates and Expenditure Bill proposing the formation of county councils composed of one half magistrates and one half guardians. At the same time it also proposed that they should have wide-ranging administrative powers. This Bill met with exactly the same fate as his previous measure.(37) In February 1852, Milner Gibson tried again to introduce a County Rates and Expenditure Bill which proposed the formation of county councils to be elected by ratepayers (i.e. it was very similar to Hume's 1836 Bill), but it was thrown out of the Commons at its second reading.(38) In

December 1852, Milner Gibson introduced yet another County Rates and Expenditure Bill which proposed the formation of county financial boards to be composed of one half guardians and one half magistrates. It also proposed that magistrates' judicial powers and their control of gaols should not be interfered with. This Bill appears to have been treated fairly sympathetically but after three nights in Committee, when it was clear that there would not be sufficient time to pass the Bill, Milner Gibson withdrew his Bill asking the Government to commit itself to the principle of the Bill. Palmerston replied by saying that the Government would introduce a measure of its own at the beginning of the next session, but it was not forthcoming.(39)

The issue of county government reform was reopened in 1861, by Sir John Trelawny who introduced a County Rates and Expenditure Bill which was very similar to the one introduced by Hume in 1849.(40) In 1868, Wild introduced a County Financial Boards Bill which, again, was basically the same as Hume's 1849 Bill. The major difference was that Wild proposed that it

should be a permissive measure. In other words it would only be adopted in those counties where a majority of the Boards of Guardians wanted a county financial board. This Bill was read a second time and referred to a Select Committee.(41) In 1869, following the Report of this Committee, Knatchbull-Hugesson (President of the Local Government Board) introduced a County Financial Boards Bill which proposed that magistrates should retain their judicial powers but that the administration of county business should be controlled by a board consisting of both magistrates and representatives to be elected by Boards of Guardians according to their gross estimated rental.(42) Using this formula, Knatchbull-Hugesson estimated that there would be a ratio on the Boards of 1 representative to 5 magistrates although he thought that not all of the magistrates would attend. This Bill was read a first time but later withdrawn without explanation.(43)

The issue was not raised again until 1878, when Sclater-Booth introduced a County Boards Bill which proposed that all of the magistrates' non-judicial business should be transferred to

county boards which would have consisted of one half magistrates and one half guardians. The Commons went into Committee on this Bill but it was withdrawn following opposition from county magistrates who did not favour the proposed fusion of county boards and Quarter Sessions.(44) In 1879 Sclater-Booth introduced a second County Boards Bill which was similar to the first except that it proposed that magistrates should exercise their judicial duties and their duties under the Police Acts separately. It was also proposed to alter the composition of the county boards so that there would be twice as many guardians as magistrates. This Bill was also withdrawn because the county magistrates objected to the fact that the reduced function of the county boards was to be at the expense of a decreased representation of magistrates.(45)

It was not until 1888, with the passing of the County Councils Act, that responsibility for local government was finally transferred from the county magistrates to elected councils. When introducing the Bill in the Commons, Ritchie said that he

proposed to leave the judicial work of the magistrates untouched, but:

We propose, however, to transfer to the new bodies all existing administrative powers of the Justices in respect of County Rates and financial business, County Buildings, County Bridges, the provision and management of the County Lunatic Asylums, the establishment and maintainance of Reformatory and Industrial Schools, the granting of licences for Music and Dancing, the granting of licences for the sale of Intoxicating Liquors - which I shall deal with separately presently - the division of the county into Polling Districts for Parliamentary Elections, the cost of the Registration of Voters, the execution of the Acts relating to the Contagious Diseases of Animals, the Adulteration of Foods and Drugs, Weights and Measures, and other minor matters with which I will not trouble the House.

Parliamentary Debates, Vol.323, 19/03/1888,
cc.1643-44

The only concession that Ritchie made to the county magistracy was with regard to policing. He argued that policing was partly judicial and partly administrative and he, therefore, proposed to create Joint Committees consisting of equal

numbers of councillors and magistrates to be responsible for policing the counties. After twenty two nights in Committee, the Bill was passed by the House of Commons and taken to the House of Lords where it was passed in virtually the same form that it had left the Commons.

Given that the content of the County Councils Act was very similar to that of the County Rates Bill that had been introduced by Hume in 1836, we must ask the question why did it take half a century to get such a measure passed by Parliament? In one of the more sophisticated conventional histories, Redlich and Hirst have suggested two possible explanations in answer to this question. Firstly, they suggest that there was little to complain of in the way that magistrates administered the counties and, secondly, they point to the fact that there was no material base for a concerted opposition to the gentry.(46) Each of these explanations are plausible but, because neither of them provides an adequate account of the struggle between the bourgeoisie and the gentry, they do not offer a sufficient answer. Although Redlich and Hirst appear

to recognise that the attempts to reform county government were part of this struggle, they are wrong to imply that this was based primarily upon the way that magistrates performed their function. The strongest arguments in favour of reform were those that advocated the bourgeois principles of representative government and the separation of administrative and judicial functions. Furthermore, by pointing only to the weakness of the opposition to the gentry in the counties, they fail to acknowledge the continuing strength of the gentry representation in the Commons for most of the C19th.

Taking their argument that there was a lack of complaint about the way in which magistrates administered the counties, it is clear that, although there were some accusations of jobbery and some complaints about the partiality of magistrates in the building of roads and bridges, they were generally not considered to be corrupt in the same way as the old corporations were. This explanation receives further support from a close reading of the Parliamentary Debates. Before 1888, criticism of the magistracy was only heard occasionally from Benthamite

radicals such as Roebuck(47) but in the debates on the 1888 measure, this was no longer true to the same extent. For example, when moving an amendment proposing that county councillors should be endowed with the functions of J.P.s, Mr. Seale-Hayne launched into an attack on the magistracy that went far beyond any criticism that had been heard in the previous debates. He argued that the existing system of appointing magistrates was unsatisfactory and he went on to say:

That dissatisfaction had frequently found expression at the meetings of the Trades Unions Congress, and it had also found expression from time to time, in the House of Commons. ... The present system of nomination and property qualification was a system by which class was set against class, because it inferred the idea that there was a class of rich men who were entitled to rule, and that there was a class of poor men whose fate it was to be ruled over. That, he maintained, was entirely inconsistent with our present democratic institutions.

Parliamentary Debates, Vol.327, 14/06/1888, c.174

He returns to this theme a little later in the same speech.

A portion of the county magistracy might be regarded as hereditary. Some of the county magistrates had no claim to a seat on the Bench other than that their fathers had sat there before; others had acquired the dignity by purchase, as it frequently happened that if a gentleman came into the county, and bought a large estate, he was straightway put on the Bench, irrespective of any personal qualification. Other gentlemen got on the Bench simply because they happened to be of the same political complexion as the Lord Lieutenant; they merely took the position because it gave them a certain amount of social position, and got them into the charmed circle of county society.

Parliamentary Debates, Vol.327, 14/06/1888, c.176

Similar radical criticism of the magistracy was heard during a later debate on an amendment proposing that county councils should have power to nominate people to the Lords Lieutenants for inclusion on the county benches. In moving this amendment, Mr. Arthur Williams argued that the system of appointing magistrates was "mischievous and unsatisfactory". He said:

The first tradition was that the Lord Lieutenant should put on the Commission of the Peace persons of

a certain rank and means, and it was a notorious fact that when the young squire was made a County Justice it was a matter of no consequence whether he was intelligent or not, or whether he was a proper person to discharge the duties of the office.

Parliamentary Debates, Vol.328, 19/07/1888, c.1800

In supporting this amendment, Mr. Picton added a criticism of the manner in which magistrates carried out their administrative functions:

They had had, for instance, a great deal of democratic legislation in the interests of education; they had had School Boards appointed; and compulsory powers passed. He asked whether that legislation had been carried out in the spirit in which it had been passed, and he replied to this question, that this had certainly not been the case. They found magistrates tending to minimize the law as far as possible, and usually their sympathies were so opposed to the working of the school board system that they were found making all sorts of excuses, and even granting payments to parents who would not send their children to school.

Parliamentary Debates, Vol.328, 19/07/1888, c.1809

The fact that this kind of radical criticism of the magistrates emerged in the House of Commons at the time when reform was finally passed could be interpreted as evidence in support of Redlich and Hirst's explanation - i.e. that a measure was passed because of the strength of feeling against the county magistracy. However, this would ignore the fact that, even in 1888, the radical opposition to the magistracy was still a minority in the Commons and none of the amendments that they moved were accepted into the final draft of the Act. The 1884 Reform Act allowed into the House of Commons a handful of working class M.P.s who were able to express their criticism of county magistrates but it would be wrong to assume that, because this first appeared in the debates in 1888, it was the prime force behind the reform. Support for a new form of local government had grown steadily throughout the 19th but the majority of M.P.s speaking in favour of reform were careful to stress that their support for the principle of more democratic local government did not imply a criticism of the county magistracy. (48)

What the parliamentary debates reveal is that the opposition to the existing system of county government was not based on its content but on its form. It was support for the principles of representative government and the separation of powers, rather than dissatisfaction with the magistracy, which led to the creation of county councils.

Redlich and Hirst's first explanation misses this and thus fails to explain why it took fifty years to reform county government. Their second argument suggests that, whereas the new industrial bourgeoisie were strong in the towns, there was no effective opposition to the gentry in the counties because of the weakness of the position of the agricultural labourers and the desire amongst industrialists to become squires themselves. The major strength of this explanation lies in its recognition that the attempts to reform county government resulted from the struggle between the bourgeoisie and the gentry. However, although there is evidence to support their point about the 'gentrification' of the bourgeoisie(49) which may, indeed, have weakened the opposition in the counties,

Redlich and Hirst overstress this side of the equation whilst understating the continuing strength of the gentry during this period. Moreover, although they acknowledge the conflict between the bourgeoisie and the gentry, they do not fully grasp the basis of this conflict. Their explanation implies that local government reform was simply a question of transferring power from the gentry magistrates to the industrial bourgeoisie but this is only a partial analysis. The importance of the County Councils Act was not that it changed the personnel of local government - in fact, in the short term, it did not do this(50) - but rather, to repeat, it introduced a new form of local government based upon bourgeois principles. It was the attempt to establish such a form that was at the heart of the struggle over county government and, it was because the gentry retained much of their strength in Parliament that they were able to resist its implementation for so long.

When Hume introduced his Bill in 1836 he appears to have been optimistic about the possibility of extending the principles

of the Municipal Corporations Act to county government.(51) If this was the case, then he seriously misjudged the strength of the gentry and the tenacity with which they would fight to retain their magisterial privileges. Following their defeat in 1836, the advocates of reform abandoned the attempt to introduce the principles of the Municipal Corporations Act wholesale and opted, instead, to introduce compromise measures "that they might get something carried, desiring, on the instalment principle, to take as much as they could get".(52) The modified proposals contained in the Bills of 1838, 1839, 1849, 1850, 1851, December 1852, and 1861 were treated more sympathetically by a number of speakers in the Commons debates but there remained an influential section led by Sir John Pakington (chairman of Worcestershire Quarter Sessions) which remained totally opposed to any change in the system of county government that involved tampering with magistrates' powers.

The parliamentary strength of this group is clear from the fact that the reformers were unable to pass even a compromise measure. However, whilst the gentry remained entrenched in

their control over the House of Commons, they were losing ideological ground. Even as staunch an opponent as Pakington was reluctant to be seen to oppose the principle of ratepayers' control of local government. When speaking against Hume's Bill in 1849, he said that he could not understand the distinction between magistrates and ratepayers. He argued that because magistrates were the major landowners in the counties they paid an enormous proportion of the rates and that, therefore, the principle being advocated by Hume - that there should be no taxation without representation - was already in effect.(53) However, he also argued that the administration of local affairs was a right (he called it a duty) belonging to property.

...one of the first duties of those who were blessed with property was to attend the administration of the local affairs of the district. In the performance of that duty they might depend on it, that whatever was for the interest of the rich man was also for the interest of the poor man in these local affairs.

Parliamentary Debates, Vol.106, 13/06/1849, c.133

In this speech he is arguing for the retention of the paternalistic rule of the gentry whom he believes have a right to rule but he does so by attempting to take over Hume's ideological ground. This reluctance to openly oppose the principles underlying reform is still more obvious in his opposition to Milner-Gibson's February 1852 Bill when he says:

Without calling in question the connection that ought to exist between taxation and representation, he was prepared to assert that the rule, although generally applicable to all countries with free institutions, did not apply at all to county affairs, or only in a degree which was very limited, and it would not be wise in Parliament, for the sake of a theoretical advantage, to tamper with arrangements which had long worked beneficially to the country, and which had never worked more beneficially than at the present time.

Parliamentary Debates, Vol.119, 08/02/1852, c.729

Here Pakington is careful not to publicly oppose the principle of 'no taxation without representation' but, equally clearly, he does not want to accept its implications. Although there was a moment in 1852 when the House of Commons appears

to have come close to passing a compromise measure⁽⁵⁴⁾, generally speaking, the gentry ensured that Pakington's line was followed. This was clearly reflected in the Report of the Select Committee on the County Rates and Expenditure Bill (1850) which dismissed the petitions in favour of Milner-Gibson's Bill saying that they were not such as to prove a general desire in the country for such a measure. The Report goes on to say that the magistrates had conducted the financial business of the counties to the satisfaction of the public and it points out that this Bill would:

substitute for them a small and fluctuating body of men, who would in many cases be less fitted for the discharge of such duties, and who would individually have a much less degree of pecuniary interest in the counties in which they live.

Report of the Select Committee on the County Rates and Expenditure Bill, 1850 (468) xiii, 1

During the 1860s and 1870s support for the principle of linking taxation with representation strengthened further. The fact that both Knatchbull-Hugesson (1869) and Sclater-Booth

(1878 and 1879) introduced Bills in their capacity as Government ministers is an indication of this. Although they were compromise measures the fact that they were introduced by Conservative governments following promises made in election manifestoes clearly reflects the political importance of being seen to support the principles behind reform. A close reading of the Parliamentary Debates during this period further reveals that not only was the principle of linking taxation to representation accepted by the vast majority of M.P.s, but that many of them favoured the introduction of some measure of reform. However, this growing support was not sufficient to enable a measure to be passed in the Commons because county magistrates both inside and outside of the Commons were able to exercise a virtual veto over any proposals that threatened their traditional privileges in county government.(55)

On the one hand, then, support for the bourgeois principle of linking representation to taxation was growing but, on the other hand, the position of the gentry in the House of Commons was so strong that they were able to block any proposed

change. The deadlock was only broken when the 1884 Reform Act changed the composition of the House of Commons and finally ended the dominance of the county gentry. Thus, when Ritchie introduced his Bill in 1888 on behalf of the Government it faced very little opposition. The only voice raised against the Bill in the Commons was that of Knatchbull-Hugesson who said:

He was afraid that the expression of what he used to think Tory opinions were now very much out of place in the House of Commons. ... He maintained ... that the Bill ... was neither more nor less than the uprooting, the upheaval, the disturbance of that system of domestic government which had prevailed in this country for generations. ... Personally he was utterly astounded that anyone calling himself Conservative could possibly support this measure, unless he were constrained to do so by political exigencies.

Parliamentary Debates, Vol.324, 19/04/1888,
cc.1802-03

This speech is a lament for the lost power of the gentry. Both for the power that they had already lost in the House of

Commons and for the power that they were about to lose to the county councils. In view of their vigorous opposition to the Municipal Corporations Act back in 1835, one might have expected stronger opposition to have emerged from the House of Lords. However, the general attitude in that House seems to have been one of resigned acceptance as summed up in the speech from the Earl of Carnarvon when he said:

In conclusion he would only say this - he accepted this Bill; he accepted facts which he had no share in shaping, and he would make the best of these facts in future; he would induce others to do the same; but he deeply regretted that this Bill should ever have been introduced.

Parliamentary Debates, Vol.329, 31/07/1888,
cc.923-24

Like Knatchbull-Hugesson in the Commons, Carnarvon is clearly accepting what appears as the inevitable defeat of the gentry and the end of magisterial control of county administration. In fact, the County Councils Act did not end this control immediately because about one half of the councillors returned

by the first elections for the county councils were magistrates and many others were related to magistrates.(56) This has led Keith-Lucas to conclude that:

The revolution which the country gentlemen had resisted for half a century had in fact resulted in making them into constitutional rulers, but not in their abdication.

B. Keith-Lucas The English Local Government Franchise, p.115

However, this misses the true significance of the Act which was that it created a new form of county administration. The County Councils Act replaced the unrepresentative, direct rule of the gentry with a new form of local government based upon the principles of separating judicial and executive functions and linking representation to taxation. It was in this respect that the County Councils Act was a victory for the industrial bourgeoisie.

Summary

With the passing of the County Councils Act in 1888 the

transfer of local government from magistrates to elected bodies and other organs of the modern state was virtually complete. We have seen that this process was closely related to the rise of industrial capitalism but it was not an inevitable product of the logic of capitalist social relations. Rather, the new forms of local government that emerged during the C19th were the product of a struggle between the bourgeoisie and the gentry and they reflect the balance of power in this struggle. The fact that the gentry remained a powerful force in Parliament and acted to defend their social position helps to explain the timing of some of the changes that took place. Because the borough magistrates tended not to be recruited from the gentry and because of the particular problem of order in the boroughs, there was relatively little opposition to the Municipal Corporations Act but, when it came to the counties, the gentry fought a long rearguard action to protect their traditional power base in the county magistracy which frustrated the attempts of the reformers to introduce county councils. The parliamentary strength of the gentry also explains the compromises that were made in both the Municipal

Corporations Act and the County Councils Act. In particular, the continuing role of the magistracy on Police Committees - a role which they have retained to the present day - reflects the fact that the gentry remained a powerful force even in 1888.

CHAPTER SEVEN

THE BIRTH OF THE NEW POLICE AND A CHANGE IN THE NATURE OF MAGISTRATES' POLICING FUNCTION

Introduction

Thirty years before the creation of elected county councils, the English magistracy had also experienced a major change in the nature of its policing function. In this chapter, we will examine the emergence of the new police and its implications for the role of magistrates in the period up to, and including, the County Police Act of 1856. We will argue that, although this development was linked to the growth of industrial capitalism, the form taken by the new police was a product of the particular social formation of nineteenth century British capitalism. We will show that, although the representatives of the industrial bourgeoisie were instrumental in the creation of this new form of crime control and order maintenance, the continued political strength of the gentry resulted in a compromise which enabled the magistracy to retain a significant degree of control over its administ-

ration.

Stages In The Formation Of The New Police

The process through which the nature of policing changed in Britain culminated in 1856 but its origins can be traced back to 1750 when Henry Fielding published his book 'An Enquiry Into The Causes of the Late Increase of Robbers, Etc.'. Fielding's work is significant not only because it was the first systematic attempt to analyse the causes of crime in London but, more importantly, because many of his proposals were embodied in legislation passed during the late C18th. He proposed a strengthening of the law relating to receiving stolen goods by: making it a criminal offence to advertise stolen goods; by regulating pawnbrokers; by making receiving an original offence - i.e., that the trial of the receiver should not depend upon the prior conviction of the thief, and; by making the mere buying or taking to pawn of stolen goods above a certain value an offence. He also proposed a change in the system of prosecution such that both prosecutor and witnesses could be paid thus making it easier to prosecute

offenders. Finally, he advocated a change in the manner of conducting executions in order to make them more awesome. He suggested that this could best be achieved by conducting them in private as soon as possible after the conviction.(1)

Although by no means all of Fielding's proposals were acted upon, they were influential in the formulation of policing policy for the remainder of the C19th. In 1751 a Parliamentary Committee was set up to inquire into the laws relating to felonies which recommended: a reform in the system of prosecution to enable more speedy and efficient prosecution of offenders; stronger legislation to deal with receivers of stolen goods; an extension of magistrates' powers to deal with robberies (e.g. by giving them powers to advertise in daily papers), and; strengthening the Watch in the City of Westminster by increasing their salary and the number of watchmen and by extending their powers to arrest people lurking the streets who could not give a satisfactory account of themselves.(2) Similar recommendations came from subsequent Parliamentary Committees set up in 1770 to inquire into burg-

laries, etc. in the City of London(3) and in 1772 to inquire into the state of the nightly watch in Westminster(4). Both of these Committees recommended improvements to the existing system of watchmen and the former also included recommendations about the law relating to receiving together with some suggestions for improving the system of punishment.

Many of these proposals were embodied in legislation. In 1757 an Act was passed which required pawnbrokers to keep records of goods that they purchased on pain of a £5 fine. The Act also empowered J.P.s to issue a search warrant when they were satisfied that such goods had been unlawfully taken from the owner.(5) The principles of this Act were extended by an Act of 1785 which introduced annual licencing of pawnbrokers and an Act of 1800 which imposed strict regulations on their rate of profit. (6) Legislation was also passed to tighten up the law relating to receivers of stolen goods. Between 1755 and 1785, a number of statutes - each relating to specific kinds of stolen goods - were passed reaffirming the principle of the independent liability of receivers. These Acts further

extended the powers of J.P.s to search for stolen goods and to arrest suspected buyers. For example:

The Act of 1756 authorised a single Justice to issue a warrant for the search of any premises where, on the oath of one witness, stolen metals were alleged to be deposited or concealed. Should the goods be found, the Act authorised two Justices to try for a misdemeanour the person who had been concealing from them and could not either indicate the party from whom he had purchased them or give a satisfactory account of how they had come into his possession.

L. Radzinowicz A History of the English Criminal Law and Its Administration From 1750 Vol.III p.72

In 1762, an Act was passed relating to receivers of stolen goods from the River Thames which contained the same powers of search and arrest as the 1756 Act mentioned above. These powers were later extended by an Act of 1782 to cover all receivers.

Under it Justices were empowered to issue warrants to search for stolen goods wherever grounds for suspicion existed, and to adjudge guilty of a misdemeanour anyone who had concealed such goods or

had had them in custody. They were also empowered to take into custody and try for a misdemeanour not only persons either suspected of carrying stolen metals at night-time or offering such metals for sale or pawn, but anyone who might carry or offer for sale any stolen goods whatsoever.

L. Radzinowicz A History of the English Criminal Law and Its Administration From 1750 Vol.III p.73

Although in his magisterial capacity he had established the Bow Street Runners and his brother John had set up the Night Patrol(7), the result of Fielding's work was little more than a tightening of the existing law relating to petty crime. Later, Benthamite reformers such as Colquhoun also criticised the existing legal system but they advocated the more radical solution of a professional police force. Their campaigning achieved some success through the Middlesex Justices Act(1792) and the Thames Police Act (1800). The former brought the existing police forces under the control of seven offices each with three stipendiary magistrates and a police force of six constables.(8) The latter created a new office which also had a complement of three stipendiary magistrates but with a force

of eighty constables.(9)

During the next three decades the number of policemen in London was slowly increased through such developments as the re-formation of the Horse Patrol in 1805 and the Unmounted Horse Patrol in 1821.(10) Critchley estimates that by 1828 "the constables employed by the seven police offices, the Bow Street Patrols, and the Thames River Police totalled some 450 men directly under the control of the Home Secretary."(11) However, these were minor developments in comparison to the Metropolitan Police Act(1829) which created a Police Office to be responsible for the newly created Metropolitan Police District extending over a seven mile radius from Central London (but excluding the City of London). This Act allowed for the appointment of two Justices under the direction of the Home Secretary to take charge of the office and to be responsible for recruiting and administering a police force composed of a 'sufficient number of fit and able men'.(12)

The Metropolitan Police Act marks an important stage in the formation of the new police but it only applied to London -

the rest of the country was still dependant upon traditional policing methods under the direct control of the magistracy. However, during the next thirty years this situation changed as uniformed police were gradually introduced throughout England and Wales. Three distinct changes can be identified in this transition. The first came in 1835 with the passing of the Municipal Corporations Act. Although this was not a Police Act, one of its provisions placed a responsibility on the newly created local councils to appoint a 'sufficient number of fit men' to be sworn in as constables.(13) In doing this the Municipal Corporations Act assisted the formation of police forces in some of the urban areas of England and Wales but it should not be assumed that it applied uniformly. Many of the new industrial towns were excluded from the provisions of this Act because they had not been granted a charter.(14) More importantly, the provisions of the Act were sufficiently vague to allow for a number of interpretations. Thus, whereas some towns (eg. Bristol) took the clause seriously and attempted to create forces along the lines of the Metropolitan police, others were less rigorous.(15)

If they could fulfil their obligations under the Act by simply taking over the old night-watchmen and day police, who for years had been employed under Improvement Act powers (or in some cases under the more recent Lighting and Watching Act), many watch committees must have argued, why embark on more elaborate and costly arrangements?

...Thus the new Leeds force of twenty men, which was created in 1836, had as its head constable the former superintendant of the night-watch (a body set up under a local improvement Act), and the four inspectors in the new force had, similarly, served as constables in the old.

T.Critchley A History of the Police in England and Wales pp.64-65.

In cases such as this, the Municipal Corporations Act clearly made little difference to the nature of policing. According to Critchley, in 1838 only half of the boroughs had established a police force and even as late as 1856 the police inspectors discovered thirteen boroughs that had chosen not to create a police force.(16)

The second stage in the growth of a provincial police force came in 1839/1840. Five separate Police Acts were passed in

these two years. The Birmingham Police Act, the Manchester Police Act and the Bolton Police Act were passed to meet the particular needs of these three unincorporated towns that wanted to set up their own police forces but were unable to because they were not yet encompassed by the provisions of the Municipal Corporations Act. A more significant measure was the County Police Act (1839) which enabled the magistrates of all counties in England and Wales, with the permission of the Home Secretary, to establish a police force in which the number of constables was not to exceed one to every thousand of the population.(17) This Act was modified slightly by the County Police Act (1840) which enabled local magistrates to form separate police districts within their counties, the expenses to be borne by the rate-payers in the area concerned.(18)

Just as the Municipal Corporations Act did not result in the formation of police forces in all boroughs, neither did the County Police Acts have a uniform effect throughout England and Wales. The decision as to whether to set up a force was left to the magistrates of each county and some were more

enthusiastic than others. Of the 56 counties, 8 adopted the Act in 1839, 12 in 1840, 4 in 1841, and a further 4 between 1841 and 1856. In other words, half of the counties responded to the County Police Acts but, of these, 4 adopted it only partially and others such as Lancashire, which had been quick to set up a rural police force, later substantially reduced the size of their force.(19)

The final stage in the formation of a national police force came in 1856. Following two abortive attempts by Palmerston to introduce a measure on county policing in 1854,(20) Sir George Gray successfully steered the County Police Act through Parliament in 1856. This Act compelled all counties to create a police force but, as an inducement, the government offered a grant of one quarter of the cost of the police force provided that the force, had been certified as efficient by one of three inspectors of police created under the Act.(21) The Act did not propose the compulsory consolidation of the 64 boroughs with populations of less than 5000 people. However, they were not included in the grant arrangements and Gray

believed that this offered them "the strongest inducement to become consolidated with the county." (22) Once such a consolidation agreement had been entered into, it could not be reversed without the prior agreement of the Home Secretary. (23) The Act also gave the Home Secretary, power to make regulations for both borough and county police forces and it imposed a requirement upon police authorities to supply the Home Office with crime statistics. (24) Following this Act, police forces were soon established throughout England and Wales under the loose control of central government, but still managed by county magistrates.

Conventional Explanations Of Police Reform

A change to the system for the maintenance of order as fundamental as that constituted by the formation of the new police could not have been contemplated in the 18th, when the traditional authority of the magistracy remained firm.

During this long period of more than three-quarters of a century, from 1750 to 1828, there was no section of public opinion, or group in Parliament or

outside, no leading newspaper or periodical which would advocate a reform in the traditional machinery for keeping the peace. The doctrine that the civil power should be exclusively vested in the justices, who, in all matters relating to the preservation of public order, and the prevention of crime should be upheld by the parochial forces, had been challenged on more than one occasion. But it had acquired an almost constitutional validity and while this belief prevailed there could be no police establishment in the proper sense of the word.

L. Radzinowicz A History of the English Criminal Law and Its Administration From 1750 Vol.III p.72

In this passage, Radzinowicz overstates the position in that he ignores the fact that small numbers of uniformed police had already come into existence following the Middlesex Justices Act (1792) and the Thames Police Act (1800). Nevertheless, the basic theme of this passage - that the authority of the magistracy remained intact and that there was widespread opposition to the idea of a uniformed police force - is supported by almost all commentators on this period.(25) In view of the strength of the magistrates' position in the early C19th, the fact that the Police Acts in 1829, 1839, and 1856

passed through the Houses of Parliament with little opposition(26) would appear to be quite remarkable, but the conventional histories of the police have failed to address themselves seriously to an analysis of why this should have been the case.(27) On the contrary, the apparent lack of opposition to the Police Acts has reinforced the teleological bias of these histories.(28) They start from the implicit or explicit assumption that the modern British police force is an ideal administrative form(29) and they have tended to see its formation as the product of some sort of inevitable process of 'civilisation'. These background assumptions have rendered it unnecessary for them to attempt to explain why the new police force was created and, instead, they have defined their task as one of describing the stages in this development, resulting in administrative histories focusing on the minutiae of "reform".

However, although they appear to be offering no more than a descriptive account, analysis and comment invariably creep into the conventional histories. This normally involves the

commentator stressing the role played by key individuals (eg. Colquhoun, Peel, Russell, Palmerston) or the impact of specific events (such as the Chartist outbursts in 1839 or the Crimean War and the ticket-of-leave system in the early 1850s). In the absence of any other explanation, they imply that the formation of the police force was a product of the actions of great men combined with spontaneous responses to immediate crises. Critchley's discussion of the Metropolitan Police Act provides an example of this. He begins by praising Peel's boldness in setting the terms of reference for the inquiry into the police of the Metropolis in 1828 and he continues by saying:

Having thus adjusted priorities to a realistic assessment of the state of public opinion, he proceeded in all that followed to display consummate parliamentary skill.

T. Critchley A History of the Police In England and Wales p.48 (my emphasis)

Critchley documents some of the ways in which Peel uses this political skill and suggests that his brilliance combines with

other circumstances to create a favourable atmosphere for the passing of the Act.

In the Duke of Wellington he now had a Prime Minister who, ever since the shock of Peterloo, had preferred to entrust the maintenance of law and order to professional police rather than soldiers; influential public opinion had been educated by the work of Bentham and Colquhoun; confidence in parish constables and watchmen had largely disappeared; and political opposition had been bought off or conciliated.

T. Critchley A History of the Police In England and Wales p.49

The problem with Critchley's explanation is not that favourable circumstances did not exist, but rather that, by focusing only on the immediate causes, he does not explain why a Metropolitan Police Act was passed. He is able to tell us why the Act was passed in 1829 rather than 1785, 1822 or 1826,(30) but, because he assumes that the creation of a police force was a 'natural' and inevitable development, he offers no explanation of why a new form of control emerged during this

period.

In this respect, Critchley is typical of the conventional historians. The major exception is J.J. Tobias. He steps back from the immediate causes and attempts to explain the emergence of the new police as a product of the twin processes of urbanisation and industrialisation. In his book appropriately entitled 'Crime and Industrial Society', he says:

In the last half of the eighteenth century and the first half of the nineteenth century, then, society was in violent transition. The towns were growing rapidly, and the facilities available to their rulers were very limited and their knowledge of how to use them even more limited. Their population, ever increasing, was predominantly a young one, and the young town-dwellers were faced with a host of unfamiliar problems, problems for which their background and training provided them with no answer. The towns, and especially London, had always had a criminal problem different from and larger than that of other areas, and there were groups of people, living in distinctive areas, who had evolved a way of life of their own based on crime. Many young town-dwellers, faced with these problems and receiving no assistance from their families or their

employers (if they had families or employers) or from the municipal authorities, found solutions by adopting the techniques, the habits and the attitudes of criminals. There was thus, in London and the other large towns in the latter part of the eighteenth century and the earlier part of the nineteenth century, an upsurge of crime which was the fruit of a society in rapid transition.

J. Tobias Crime and Industrial Society p.37

In a later book, he suggests that the development of the new police was a direct response to this situation.

The reform of the police in the nineteenth century must be seen as part of the development of efficient forms of town government, one consequence of the rapid urban growth that characterised the period. The towns of the eighteenth century had tried to deal with the problems of policing, drainage and sewerage by a haphazard machinery of local government made up of medieval survivals and the results of later tinkering. In the nineteenth century this machinery was seen to be utterly unequal to the new challenges and it was completely remade. The need for action was greatest, and the task of reform most complex, in the London area, where the system of local government had failed to adapt as the capital

had grown over the centuries. The urgency of the situation there led to the development of a new method of policing, a new method that was quickly adopted in the rest of the country.

J. Tobias Crime and Police in England 1700-1900
p.74 (31)

What distinguishes Tobias' account from other conventional histories is the fact that he attempts to relate the formation of the new police to changes in the nature of society. He suggests that it was part of the process through which the "nation's institutions had been remodelled on lines suited to the urban, industrial society that England had...become." (32) This explanation has a superficial plausibility in that changing patterns of work and the concentration of people in factory towns were significant changes which radically altered the lifestyles of large numbers of people. However, even if we accept that the growth of factories and large towns caused an increase in crime and a breakdown of social morality, Tobias offers no explanation of how this resulted in the formation of the new police other than the assertion that 'something had to

be done . He is only able to treat this as unproblematic because he adopts the consensual view implicit within the concept of 'industrial society'. He has a view of C19th British society as a functional whole and, from this position, the creation of the police force appears as a necessary measure to adapt to changing circumstances. However, this overlooks the fact that Britain was not simply an industrial society but a capitalist industrial society(33) marked, not by consensus but, by conflict, involving the bourgeoisie, the gentry and the working class. The creation of the new police can only be fully understood in the context of the struggles between these groupings. This explains, not only the need to replace the traditional machinery, under the control of the magistracy, but also, why it emerged in this particular form.

The New Police and the Protection of Property

During the C18th, the gentry maintained a strong opposition to the idea of a professional police force.(34) This was usually expressed in terms of fears about the introduction of an alien force and an increase in the powers of central government.

However, underlying this was a desire to protect the basis of gentry rule.

No doubt the fear of Leviathan was genuine, but it is certainly also the case ... that they objected to the exercise of power over their subordinates being placed in other hands. In their analysis, preventive policing was adequately performed by the beadles, the nightwatch, the bow Street Runners, etc., who were directly under the control of the bench.

J. Palmer Evils Merely Prohibited p.12

Not only did the existing decentralised system enable the gentry to retain policing as a local responsibility under the control of the magistracy, but also C18th criminal law offered an effective protection for the property of the gentry.(35) However, the property interests of the emerging industrial bourgeoisie did not receive the same protection. They were largely excluded from the magistrates' bench and, because they were unable to obtain pardons, they did not derive the same benefits as the gentry from the system of capital punishment. Consequently, the bourgeoisie, together with merchants who

were similarly vulnerable, looked for alternative methods of protecting their property. We will see, in the following chapter, that this led them to support criminal law reform but it also led to initiatives in the field of policing. In the late C18th and early C19th the situation was such that the bourgeoisie was not sufficiently developed to mount a serious challenge to the traditional power of the magistracy and the gentry, as yet, had no cause to support new forms of crime control or order maintenance. Thus, property owners, in many parts of England and Wales, joined together to form their own felons associations.(36)

the Association would pay the expenses incurred by the local constable or his assistants, by the patrol riders going beyond their assigned routes in pursuit of the missing property and the offender, or by private individuals who helped to arrest the offender. The result was that the expenses of search and apprehension before committal - those that were least certain to be repaid by the county, and whose absence deterred so many prosecutors from proceeding - were guaranteed, and men were supplied for the

function of search and apprehension.

D. Philips Crime and Authority In Victorian England
p.121

Thus, although these associations were concerned primarily with refusals to prosecute resulting from the complexities of the legal system(37), they also provided a rudimentary private police force to apprehend offenders. This was taken furthest in London where the dramatic rise in the volume of trade increased the merchants' need to protect their property proportionately. The London merchants responded by forming their own private police forces. In 1749 merchants, wharfingers and lightermen combined to finance a force of 'merchant constables' and in 1778 the West India merchants set up the 'Marine Police Establishment'.(38)

With the advantage of hindsight, it is possible to trace the continuities from the early attempts to protect property through these private associations to the professional police force that emerged in the C19th. However, at the time, there was no direct challenge to the existing system and changes

were restricted to attempts to bolster the existing machinery. This can be seen most clearly in the work of Henry Fielding. He prefaces his remarks by suggesting that the increase in crime was a product of the increase in trade.(39) He was concerned to ensure a better protection of private property in the Capital but the measures that he proposed and the legislation that was based on them, involved a tightening of the existing law and a strengthening of the powers of the existing forces of law and order. (See Above) It was not until the turn of the century that the Benthamite "vanguard" of the bourgeoisie - in particular Patrick Colquhoun - began to advocate a professional police force as the most effective means of protecting property. When discussing the growth of the port of London, Colquhoun describes in some detail the rapid increase in commerce during the C18th and he argues that the data he produces:

cannot fail to produce a conviction of the indispensable necessity of a well-planned and energetic system of River Police, to regulate and control the economy of so vast a machine, and to

protect such an astonishing mass and variety of property in its repeated transits to and from the ships and vessels, until it can be ultimately deposited in places of security. This detail also may serve to show, how inefficient and abortive must all the efforts of individuals prove in preventing plunder, and depredation, without the superior power of legislative aid.

P. Coquhoun A Treatise On The Commerce And Police Of The River Thames pp.21-22

His argument that bourgeois property can only be protected by a professional police force is made still more forcefully in Chapter Two of his Treatise when he discusses the increase in pilfering from the docks. Here, he asserts that the majority of people engaged in this activity would not entertain the idea of committing other crimes such as burglary and he goes on to say:

The leading cause of the evil is to be traced, to the total deficiency of any measures of preventive police, calculated to check the progressive increase of crimes: the constant and never-failing attendant on the accumulation of wealth. In the course of the advance of the latter, which has already been shown

to have been rapid beyond all example, nothing material has been attempted towards the suppression of the former; and hence it has followed, that commercial riches and criminal offences have grown up together.

P. Colquhoun A Treatise On The Commerce And Police Of The River Thames pp.155-156 (original emphasis)

Both Colquhoun and Bentham played an important role in the passing of the Thames Police Act (1800),(40) and, thus, this very early stage of the birth of the new police can be seen as an attempt to offer better protection to the property of the industrial bourgeoisie. Later stages in the history of police reform cannot be explained as unambiguously in this way but it is still possible to trace this theme through the 19th Police Acts. Because of the lack of parliamentary opposition to the Metropolitan Police Act, Peel was not forced to offer a detailed argument in favour of the measure but he does discuss the increased rate of crime in London referring to incidents in Kensington, Tottenham and Spitalfields to support his argument that the existing parochial police were unsatisfactory and he says:

For my own part, I consider that it is to be attributed, in some measure to the exposed and insecure state in which property is placed in many parts of the metropolis, and to the facilities which are afforded of removing it from one part of the country to another - in a word to the increased means of committing and concealing the commission of an offence, and to the increased ingenuity of those who live by preying on their neighbours.

Parliamentary Debates 28/2/1828, Vol.18, c.791

And, on another occasion, he says:

All causes, therefore, of the increased comforts of the people of the country become the sources of crime; not less from the increased temptation which they necessarily created, than from the increased facilities which they afforded of perpetration and evasion.

Parliamentary Debates 15/4/1828, Vol.19, c.871

The Acts passed in 1839 also passed through both Houses of Parliament with virtually no debate and so, like Peel, Russell was not compelled to defend his measure. The Parliamentary Debates on this legislation are dominated by a sense of panic

about the Chartist disturbances(41) which has led some commentators to explain the 1839 Acts purely as a response to Chartism. We will argue later that this usually involves a misunderstanding of the significance of the Chartist outbreaks but it also overlooks the fact that Russell had been working on police reform for a few years prior to these events. In 1836 he had set up a Royal Commission to consider police reform in the counties. The content of this Report is revealing because, having been written before the Chartist outbreaks, it does not reflect the same concerns as the Parliamentary Debates. The Report was strongly in favour of extending the new police to the counties, not to improve public order but, to protect property.

The Royal Commission, 'for the purpose of Inquiring as to the best means of establishing an efficient constabulary force in the counties of England and Wales', spent nearly three years on its task. It amassed much colourful evidence about the state of crime, the careers of habitual delinquents, the nature of their depredations, the degree of insecurity of travellers on the roads, and the increasing risks opened up in rural areas by the

conveyance of valuable cargoes by canal and railway. A commercial traveller with interests throughout the south of England said that it was only on very rare occasions that he dared to travel after dark. 'Occasionally in a moonlight night I may; but it would be contrary to prudence for any person who travels about the country with such money in his pocket to be out after dusk'. This was the almost universal habit amongst travellers. A straw-hat manufacturer agreed, and said that he had himself been shot at near Harpendon, while on his way to Luton Market to buy straw, and a third traveller testified that farmers in northern towns commonly waited for hours to make up parties for their return home after dark from the markets, rather than risk the journey alone. Asked (no doubt by Rowan) what kind of force would give confidence to travellers, the witness predictably replied, 'A police like the Metropolitan, on which one might rely in case of need'. The local and municipal police, he said, could not be relied on.

T. Critchley A History Of The Police In England And Wales p.69

Although the Report was not published until after the County Police Act had been passed, Russell was clearly aware of its findings and he referred to them in introducing the measure.

The commissioners appointed by the Government three years ago in order to investigate the subject had shown in their report how very often it happened that thieves and depredators of every description enjoyed perfect impunity, owing to the inefficient state of the police.

Parliamentary Debates 24/7/1839, Vol.49, c.728

He returns to this theme a little later in the same speech.

He thought the Bill he proposed to bring in would lay the foundation of an improved system in the county. At periods remote from the present time, it might have been quite sufficient to have a constable unpaid and appointed without qualification, but the circumstances of the present day, when the population had greatly increased, and where there were great amounts of property exposed to depredation, made it necessary that the constabulary force should be more efficient.

Parliamentary Debates 24/7/1839, Vol.49, c.731

Concern about the protection of property emerges again in the debates on the 1856 Act. Here, too, there was a concern about public order problems - this time it was those anticipated as

a result of the ticket-of-leave system.(42) Nevertheless, when introducing the Bill at its second reading, Grey stresses the importance of protecting property rather than the consequences of the ticket-of-leave system. He says that the County Police Act had shown up the deficiencies of the old system of parish constables and that it had offered a more effectual prevention and detection of crime and a greater protection of property.

He goes on to say because of:

the obstacles which were placed in the way of the apprehension of offenders and the repression and punishment of crime by the partial application of the present county constabulary Acts under which, a police force being maintained in one county and none in another, great facilities for escape are given to criminals, and obvious difficulties thrown in the way of detection; ...

Parliamentary Debates 10/3/1856, Vol.140,
cc2114-2115

We can see then that the desire to protect property was an important factor at each stage in the formation of the new police. However, it would be mistaken to conclude that this

was the only, or even the major factor. The situation was far more complex than this. Firstly, it is clear from our discussion of the reform of local government, that the bourgeoisie did not acquire the strength to impose new legal and political forms until later in the C19th and, therefore, we must explain why the gentry did not oppose the formation of the new police. We will return to this question later but, first, we will examine a second advantage for the bourgeoisie - i.e., the creation of a disciplined labour force.

The Police As Agents Of Discipline

From the earliest moment in the reform of the police we can see that the desire to protect property was accompanied by a concern to control the poor. Thus, Fielding argues that the free movement of the poor is an encouragement to crime and, in answer to his question what is to be done about it, he says:

Is it not to hinder the poor from wandering and this by compelling the parish and peace officers to apprehend such wanderers or vagabonds, and by empowering the magistrate effectually to punish and

send them to their habitations? Thus if we cannot discover, or will not encourage any cure for idleness, we shall at least compel the poor to starve or begat home: for there it will be impossible for them to steal or rob, without being presently hanged or transported out of the way.

H. Fielding An Inquiry Into The Late Causes Of Robbers, Etc. p.144 (original emphasis)

In this passage, the concern with controlling the poor is clearly related to the need to protect property but in other passages we get a glimpse of another dimension to the concern with control over the poor. Earlier in the book, when he discusses drunkenness, Fielding asks the question what is to become of the future generation born in gin?

Are these wretched infants (if such can be supposed capable of arriving at the age of maturity) to become the future sailors, and our future grenadiers? Is it by the labour of such as these, that the emoluments of the peace are to be procured us, and all the dangers of war averted from us? What could an Edward or a Henry, a Marlborough or a Cumberland effect with an army of such wretches? Doth not this polluted source, instead of providing

recruits for the sea or the field, promise only to fill the alms-houses and hospitals, and to infect the streets with stench and diseases.

H. Fielding An Inquiry Into The Late Causes Of Robbers, Etc. pp.30-31

In this passage, Fielding is not concerned with the protection of property but with the lack of control over the masses. Thus he is not concerned simply with exercising greater control over the movements of the poor (although he did advocate this) but, rather, he is interested in turning them into "useful" members of society. This is a theme which becomes much more fully developed in Colquhoun's writing. He starts from the assumption that the moral order is collapsing and that new measures are required to restore the morality of the lower orders of society.(43) He suggests a variety of ways of doing this ranging from tighter legal control of prostitution, gambling, vagrancy, etc. to punishing 'crimes against virtue and religion' such as adultery.(44) He even suggests that the police force might be used to give 'a right bias' to public amusement.(45) However, his thoughts went much further than

this. He meant to imbibe the poor with a bourgeois morality so that they might provide a well-disciplined labour force.

Labour is absolutely requisite to the existence of all Governments; and as it is from the poor only that labour can be expected, so far from being an evil they become under proper regulations, an advantage to every country, and highly deserve the fostering care of the Government.

P. Colquhoun A Treatise On The Police Of The Metropolis pp.365-366

Colquhoun elaborates on this at some length when he reflects on his part in the passing of the Thames Police Act.

Although in his arduous pursuit, the author of this work has experienced infinite difficulties and discouragements, yet is he rewarded by the consciousness that he was engaged in an undertaking in which the best interests of society were involved:- that independent of the pecuniary benefits derived by the State, and the proprietors of commercial property (which already have unquestioningly been very extensive) he has been instrumental in bringing forward a great preventive system, and by administering the laws in conjunction

with a very zealous, able, and humane magistrate, [i.e John Harriott, M.W.] in a manner rather calculated to restrain than to punish, a multitude of individuals, together with a numerous offspring, are likely to be rendered useful members of the body politic, instead of nuisances to society. - The advantages thus gained (although his labours have been in other respects gratuitous,) will abundantly compensate the dangers, the toils, and the anxieties which have been experienced. In the accomplishment of this object, both the interests of humanity and morality, have been in no small degree promoted: unquestionably, there cannot be a greater act of benevolence to mankind, in a course of criminal delinquency, than that which tends to civilize their manners; - to teach them obedience to the laws; - to screen themselves and their families from the evils and distress attendant on punishment, by preventing the commission of crimes; - and to lead them into the paths of honest industry, as the only means of securing real comfort and happiness which a life of criminality, however productive of occasional supplies of money, can never bestow. - If it shall be considered (as it certainly is) a glorious achievement to subdue a powerful army or navy, and thereby secure the tranquility of a state - is not the triumph in some degree analogous, where a numerous army of delinquents, carrying on a species of warfare no less noxious, if not equally hostile,

shall not only be subdued by a mild and systematic direction of powers of the law; but that the conquered enemy shall be converted into an useful friend, adding strength instead of weakness to the government of the country.

P. Colquhoun A Treatise On The Police Of The Metropolis pp.245-247 (original emphasis)

The above extracts show how the concern with the morality of the poor expressed by Fielding had, in the writing of Colquhoun, become a clear vision of the necessity to "conquer" the poor and mould them into productive labourers. However, we must be careful not to accept uncritically what reformers such as Colquhoun say about reform as the truth.(46) Thus, the fact that he wanted the police to conquer the working class and convert them into useful labourers does not necessarily mean that the police succeeded in this task or, indeed, that they even attempted to carry out the task. These are empirical questions and to answer them we need to look more closely at the activities of the new police.

Attempts by the industrial bourgeoisie to 'discipline' the

working class predate the Thames River Police. They can be seen, for example, in the activities of the Society for the Reformation of Manners formed by Zouch and Wilberforce in the 1780s. Thus, when discussing this Society, the Webbs say:

This movement came, as we pointed out, from several distinct but converging currents of public opinion - the new-found Evangelical zeal for saving men's souls, the growing dislike of the propertied class of the insecurity of life and property, the alarm both of the financier and the ratepayer at the increasing burden of the poor rate, and last but not, we think, least, the half-conscious desire of the rising class of industrial capitalists to drive the manual workers out of the alehouse and gin-shop into the factory and workshop. Such being the influences at work, it is not surprising that the most signal and durable manifestation of the movement should have been the strenuous attempt to restrict the temptations to, and the opportunities for, licentious conduct, disorderly gatherings, wasteful expenditure and idle hours, which an unlimited supply of unregulated public-houses offered to the lower orders.

S. & B. Webb The History of Liquor Licensing p.57

With the growth of industrial capitalism in the C19th, the bourgeoisie became increasingly concerned about the way that their workers spent their time out of the factory. With the widespread growth of factory production a physical separation occurred between mill-owners and factory workers both inside and outside of the factory. This physical separation was accompanied by an increasing lack of social contact between the two classes. In the C18th, popular culture provided an important point of contact between the gentry and their labourers. Although this culture generally sanctioned the authority of the gentry it was, nevertheless, a shared culture. "The race meetings of the rich became the poor's popular holidays" and "The permissive tolerance of the gentry was solicited by the many taverns which - as inn signs still proclaim - sought to put themselves under the patronage of the great."(47) Not only did the gentry sanction popular culture but they openly and, sometimes officially, patronized traditional customs and celebrations.(48) In the new industrial areas at the beginning of the C19th this informal contact was disintegrating. The gentry were evacuating these areas in

favour of the more pleasant environment away from the factories(49) and the industrial bourgeoisie did not cultivate informal social connections with the industrial working class. Inside the factory, relations between the classes tended to be formal and impersonal and outside of the factory there was little evidence of a shared culture.

The Victorian bourgeoisie which set the moral tone of cities like Manchester and Leeds were not likely to patronize the cockpit as the Preston gentry of the late eighteenth century had done, or to shower coins on a Guy Fawkes crowd as the Wakefield Tories still felt at liberty to do at mid-century. Such gentlemen were much more inclined to either mind their own business and businesses or else to patronize temperance or rational recreation societies or mechanics' institutes.

R. Storch The Policeman As Domestic Missionary
p.492

This physical and cultural separation meant that the industrial bourgeoisie lacked first hand knowledge of the working class and their leisure activities. As a result, they became deeply suspicious - if not fearful - of the industrial

proletariat.

We can, in fact construct a composite image of the working classes as they appeared to some of the better known middle-class publicists of the time. They were portrayed as sunk in bestiality, improvidence, intemperance and lack of sexual restraint; their family lives appeared atomised and their 'homes' non-existent; they were viewed as exempt from the restraints of religion and apparently beyond the direct and indirect influences which could conceivably civilise them. In terms of their character-structure, they were perceived as the very negation of the bourgeois and his virtues.

R. Storch The Problems Of Working Class Leisure
p.141

This view reflects the bourgeoisie's fear of the industrial proletariat. Although they were able to exercise strict control inside their factories,(50) they had no control over their activities outside of the factory. Given that the proletariat were perceived by the bourgeoisie as a potentially revolutionary threat: "popular disorder of any type, even manifestations usually devoid of overt political content -

public house affrays, dogfights, races, popular fetes of any type - seemed to constitute a clear and present danger to the social order."(51)

This fear reflects the crisis of control in the industrial areas where the bourgeoisie could no longer rely upon the informal mechanisms of control that had served the gentry in the C18th.

One consequence of what political economists called "free labour" was the appearance of its concomitant, "free leisure", and of a working class by and large left to itself once it passed out through the factory gate or workshop door in the evening. By the middle of the nineteenth century - if not earlier - a profound interruption of communications had occurred between the classes: both the "language" and the objectives of urban masses were, if intelligible at all, deeply frightening. ... The older understanding that movements of the lower orders had rational, legitimate, or at least comprehensible ends was replaced in the first half of the nineteenth century by the feeling that they aimed at the utter unravelling of society. To some extent these fears were reflected in a concern that the lower classes had escaped from all social control except

the discipline of work. The activities of workers after their release from the salubrious discipline of the workshop or factory therefore became a matter of both profound interest and apprehension.

R. Storch The Policeman As Domestic Missionary
p.495

A number of commentators have suggested that the bourgeoisie responded to this situation by engaging in a form of cultural warfare against the emerging working class.(52) This assault took the form of a pincer movement. On the one hand, there was an attempt to 'educate' the working class into a bourgeois morality. This took place through a wide range of philanthropic organisations(53), through the conscious efforts of civil servants such as Chadwick, Kay and Nassau Senior(54) but, most importantly, through schools.(55) These attempts were accompanied, on the other hand, by a more direct repression of the working class through the New Poor Law(56), the suppression of fairs and other popular festivals(57) but, most importantly for our discussion, through the new police. The latter were employed to report on trade union activities,

public opinions and movements within the working class(58) but they were also used to monitor a range of working class leisure activities.(59)

In northern industrial towns of England these police functions must be viewed as a direct complement to the attempts of urban middle class elites - by means of the sabbath, educational, temperance, and recreational reform - to mould a labouring class amenable to new disciplines of both work and leisure. The other side of the coin of middle class voluntaristic moral and social reform (even when sheathed) was the policeman's truncheon. In this respect the policeman was perhaps every bit as important as a "domestic missionary" as the earnest and often sympathetic men high-minded Unitarians dispatched into darkest Leeds or Manchester in the 1830s and 1840s.

R. Storch The Policeman As Domestic Missionary
p.481

The work of Storch, on the activities of the early police forces in northern Britain, has shown us that they were used by the industrial bourgeoisie in an attempt to incorporate the working class, through an assault on proletarian culture. To

this extent, Colquhoun's vision of the police as a 'conquering army' converting the working class into 'useful members of society' became a reality. However, although this constitutes a dimension to police reform, it should not be overestimated. The fact that the bourgeoisie used the police in this way does not, necessarily, mean that they consciously set out to establish it for this purpose. There is little evidence to support such an interpretation, other than the writings of Colquhoun that we have already considered. Certainly, this form of 'social control' did not form part of the discourse in the Parliamentary Debates on any of the major Police Acts. Moreover, we must, once again, remind ourselves that the bourgeoisie were not the dominant political grouping during this period. Thus, even if their usefulness in controlling working class leisure was a factor in the bourgeoisie's support of a uniformed police force, this can not explain why a new form of county police emerged so much earlier than a new form of county government.

The Police And The Threat Of An Organised Working Class

So far, our discussion has focused primarily on the reasons why the industrial bourgeoisie favoured replacing the traditional machinery, under the direct control of the magistracy with a new form of policing. However, although we do not wish to deny the importance of this support, it is not sufficient to explain the fact that change occurred at a relatively early stage in the C19th. To address this issue, we must show why the gentry supported the extension of the new police to the counties. One possible explanation of this may lie in the fact that the position of the gentry was also changing. Not only were they becoming involved in similar kinds of enterprises to the bourgeoisie but, the abolition of capital punishment meant that gentry property no longer received the same protection that it had in the C18th. In the following chapter, we will see that this led some sections of the gentry , in the middle of the C19th, to look for more effective methods of protecting property but this is not sufficient to explain the formation of the new police. This affected sections of the

gentry in different ways and, when it emerged in the debates on the extension of summary justice, it led to a split in the gentry which was articulated in the Parliamentary Debates. This was not the case in the debates on the Police Acts. In particular, the County Police Act passed in 1839, which appears to have struck at the heart of the gentry's authority by tampering with the police function of the county magistracy for the first time, met with virtually no opposition from the gentry. We will argue that this can be explained in terms of the threat posed by a potentially revolutionary working class which could not be contained by the traditional form of order maintenance, thus forcing the gentry to accept change. We will further argue that, in fact, the changes that occurred were not as damaging to the position of gentry magistrates as is often assumed and that this was both a cause and effect of their tacit acceptance of county police forces.

A number of authors have pointed to the importance of the Chartist outbreaks in the passing of the Police Acts in 1839. These accounts usually contain the implicit assumption that

this legislation was simply one step in the inevitable development of the modern system of policing and the Chartist outbreaks are presented as the trigger which provoked the necessary action. This interpretation receives superficial support from the Parliamentary Debates on these measures which are punctuated by anxiety about the disturbances. Also the speed with which they were passed, and the lack of opposition to them, feeds the teleological interpretation of the conventional histories. However, in stressing the effects of the Chartist disturbances, they ignore the fact that the weaknesses of the traditional machinery of order maintenance had been exposed many times before without eliciting the same panic that occurred in 1839. To understand this, we must first take a closer look at the nature of these earlier outbreaks of civil unrest in the late C18th and early C19th and the way in which the traditional machinery coped with them.

We have seen that responsibility for the maintenance of public order had traditionally been in the hands of local magistrates but the following passage from Mather's book on the Chartist

period provides a useful summary of the traditional system.

When riots broke out in a particular locality it was the clear duty of the local magistrates to muster a sufficient local force, to lead it in person to the scene of disorder, to read the Riot Act to the mob and, if necessary, to give the order to fire. If the regular force was inadequate, any two justices had power to swear in special constables. Should these prove insufficient, they might call out on their own authority the local troop of Yeomanry, or requisition a regular military force from the nearest barracks. Towards the end of the period they acquired the additional power to summon corps of Enrolled Military Pensioners, afterwards applying to the Home Office for a warrant legalizing their action. They might forbid meetings likely to prejudice the public peace. They might also issue warrants for the arrest of rioters and, in default of sureties for their good behaviour, commit them to prison to take their trial at the Assizes or Quarter Sessions. Their warrants would also enable Chartist arms, private papers and unstamped periodicals to be seized. Finally, if all these measures failed to restore the peace, it was up to the local magistrates to move the Lord Lieutenant or the government to send further aid in the shape of regular troops, Yeomanry, Metropolitan Policemen, or hard cash. Their regular control over the machinery of public

order extended to the swearing in of parish constables and, universally after 1842, to the appointment of the same.

F. Mather Public Order In The Age Of The Chartists
p.54

For most of the C18th this system had been sufficient to deal with popular disturbances of all kinds but, in the late C18th, weaknesses began to emerge. These first became apparent during the anti-Catholic Gordon Riots in London in June 1780. These riots were the most serious of the C18th and, and in terms of the destruction of life and property, were more serious than any of the later Luddite or Chartist outbreaks.(60) However, for our purposes, their significance lies in the failure of the local magistracy to act decisively in dealing with them. A Catholic chapel was set on fire and a priest's house ransacked while troops were present with a justice of the peace but the latter did nothing to intervene(61) and at the height of the riot, magistrates' refusal to attend and instruct the troops forced the King to summon the Privy Council to issue a proclamation authorising the army to take action without

instructions from the civil power.(62) The reasons for the magistrates' failure to act appear to have been threefold. Some magistrates supported the rioters cause and did not wish to act(63), there was an element of intimidation insofar as those magistrates who opposed the crowd were liable to have their own property destroyed(64) but, more importantly for the present discussion, there was confusion amongst those magistrates who did wish to act.

It was widely believed by both magistrates and officers that troops could not be used until the Riot Act had been read, and even then a chain of prosecutions for murder against justices and soldiers had taught both to act warily. Soldiers, in particular, were extremely reluctant to interfere without the authority of a magistrate and before the reading of the Riot Act. Another confusion arose from the belief that an hour had to be allowed after the reading of the Act before action could be taken. As a result a kind of paralysis affected the soldiers and magistrates in the early days of the riots as their uncertainty permitted the situation to escalate. It was not until the Attorney-General and later, Lord Mansfield made a clear declaration of the law that the rioters were dealt with firmly.

Even so, confusion about the law of riot remained through the period and was to recur as a source of dispute in the nineteenth century.

J. Stevenson Popular Disturbances In England p.89

The weaknesses in the traditional machinery became still more obvious in the early C19th when disturbances occurred in the new industrial areas of the North and Midlands. One reason for this was that there were simply not enough magistrates in these areas. By tradition, the Lords Lieutenants of the counties preferred to appoint members of the gentry to the magistrates' bench and they resisted pressures to appoint 'men of trade'. However, this policy was creating increasing difficulties because the gentry were evacuating the industrial areas leaving a shortage of 'suitable' candidates.(65) Thus, a situation was developing in which trouble-ridden areas were emerging where the system of maintaining order was at its most vulnerable.(66)

In fact, this was not an insurmountable problem for the traditional system and, as a result of pressure from central

government, many Lords Lieutenants were persuaded to modify their appointment policies to include industrialists.(67) However, the problems were more deep-seated than this and, even where magistrates were available to deal with the disturbances, they often proved to be inadequate. Mather suggests that many magistrates protected their own interests at the expense of the public good.(68) At other times the failure of the magistrates was due to their inability or unwillingness to accept their responsibilities. For example, in his discussion of the Luddites, Thomis says:

The key figure in this situation was the local magistrate, and the success with which the problem of Luddism was tackled in any one area was determined by his energy, resolution and intelligence. Unfortunately the high qualities and initiative which the successful pursuit of Luddites demanded were not markedly present inside the magisterial group; it was distinguished by its incompetence and misjudgements rather than by qualities making for success.

M. Thomis The Luddites p.147

Thomis returns to this theme in a later book when he discusses law and order.

When General Maitland went North to Lancashire in 1812 his endless trials and tribulations were a principle theme of his correspondence to the Home Secretary as he reported on the apathy, inactivity, confusion, and jealousy that prevailed amongst the local magistracy. And an almost identical picture was painted by General Napier 30 years later, when he complained of magistrates who disappeared from the scene of action, leaving everything to the army, and on one occasion of magistrates who went off to shoot grouse at the height of the troubles of 1839. Poor Napier even found the Home Secretary Russell 'very ignorant of what was going on' in 1839.

M. Thomis The Town Labourer And The Industrial Revolution p.33

In addition to the failings of individual magistrates there were other major problems with the traditional machinery. In the final resort the army was used to quell disturbances but when, in the C19th, the army was resorted to more frequently, its limitations became increasingly apparent. One dimension to this was the fact that soldiers often sympathised with the

crowd and in many cases soldiers acted to assist the "rioters".(69) It was hoped that the creation of the Volunteers as a separate force might overcome this problem but, according to the Hammonds, in the industrial towns of the north of England they, too, were likely to either refuse to act or to act with the crowd in the case of food riots or strikes.(70) Even if the soldiers could be relied upon, the army was a cumbersome instrument to use for the maintenance of order. Since the army was relatively ineffective if troops were parcelled into small groups to hunt rioters or Luddites, large numbers of soldiers had to be deployed in order to be effective.(71) In addition to the practicality and the expense involved, the use of the army in this way was often seen as the use of a sledgehammer to crack a nut(72) and this further fuelled popular hostility towards the army. The many difficulties in using the army to preserve public order are summed up by Stevenson when he says:

Increasingly after 1815, the radical press was free to conduct a running war with the authorities, condemning occasions of 'praetorian licentiousness'.

The events at Peterloo, its very name a product of the radical press, greatly strengthened the case against the use of soldiers as a police force. Although they had to be used extensively during the Luddite outbreaks, the army frequently opened up the government to attack. In that sense, the army could not be used as lightly as many have supposed. This at least partially accounts for the reluctance of Home Secretaries to despatch troops whenever called upon to do so. In fact the government was frequently in the position of refusing to give military support to worried magistrates. They did this because they often doubted the judgement of the magistrates with which they dealt in the manufacturing districts. They feared too, that troops would be parcelled out in small detachments and worn out in constant duties - a situation that could easily provoke discontent amongst the troops themselves, besides exposing the army more effectively to the influence of the populace amongst whom they were billeted.

J. Stevenson Social Control And The Prevention Of Riots In England, 1789-1829 p.35

It is clear, then, that in the late C18th and early C19th, the increasing strain that was being placed upon the traditional system for the maintenance of order was beginning to cause cracks to appear in its structure. However, although a number

of contemporaries commented on the ineffectiveness of the system in general and the leadership of the local magistrates in particular, few were prepared to suggest that it should be replaced by a professional police force. Even as late as 1831, when law and order appeared to have collapsed in many of Britain's largest cities,(73) there was no call for its replacement. When speaking about the election disturbances of that year, Earl Grey (the Home Secretary) said:

The law as it at present stands, has been found by active magistrates, who exerted themselves properly, to be sufficiently powerful to put down disturbances.

Quoted in D. Williams Keeping The Peace p.13

When the deficiencies of the traditional system were exposed again by the Chartist outbreaks in 1839 , the response was quite different. Whereas, in the past, the shortcomings of local magistrates had been tolerated, in 1839 they were the source of widespread concern - if not panic. The initial Parliamentary Debates on the events in Birmingham were

peppered with party political rhetoric. The Earl of Warwick accused the Birmingham magistrates of failing to act because they were in sympathy with the Chartists.(74) These accusations were later repudiated, in the Lords, by Brougham who said that no one who knew the magistrates concerned "would think of imputing to them anything more than an error of judgement, and a mistaken feeling of humanity."(75) ;and, in the Commons by Russell who said:

If there have been faults or negligence in this instance, I believe it to have been from an error in judgement on the part of the magistrates in imagining that the town was restored to tranquillity, and perhaps from an apprehension that they might be blamed if they proceeded to measures of great activity in repressing the appearance of tumult, and not from any sympathy with the rioters.

Parliamentary Debates 17th.July 1839, Vol.49, c.413

Warwick's initial attack on the Birmingham magistrates was an extension of an ongoing conflict between the Conservative county magistrates in Warwickshire and the radical Birmingham Corporation.(76) Similarly, the interventions of Russell,

Brougham and others were attempts to defend their side of the House. The party political dimension raised the tempo of the debate but we should not allow this to obscure the fact that there was a consensus about the fact that the local magistrates had failed to cope with the Chartist outbreaks in Birmingham. Thus, although Russell and Brougham refute the allegations of political bias, they accept the fact that 'errors of judgement' were made. This failure of the magistrates was expressed most clearly by the Duke of Wellington who, on this occasion, appears to have remained aloof from the party wranglings. When replying to a comment to the effect that there had been no deficiency of law and order, he agreed that there had been no deficiency of police or military "but it appears to me that there was a great deficiency on the part of the magistrates to keep the peace." (77) A little later in the same speech, he says:

I have been in many towns taken by storm, but never have such outrages occurred in them as were committed in this town only last night, and under the eyes of magistrates appointed, not under the

Great Seal, but by the Secretary of State for the Home Department. In their presence, property was taken out of many houses and burnt in the streets, before the faces of the owners of it, not withstanding the presence of the police and troops, with ample means of putting an end to these disgraceful disorders. This state of things ought not to have been allowed to go under the eyes of magistrates, and also under the eyes of troops, without anything being done about these outrages.

Parliamentary Debates 16th.July 1839, Vol.49, c.374

The general feeling of both Houses of Parliament was summed up by Melbourne speaking towards the end of the last debate on the County Police Bill in the Lords. He asked whether it would be prudent or safe to allow the country to remain without some measure for the maintenance of public order, and he says:

It had been stated in former Sessions, and it was now pretty clear to their Lordships - nay it was manifest, from the state of the whole country, that the present force of constables was insufficient even to carry into effect the ordinary law in ordinary times of trouble and excitement, and therefore some measure, like the present, was required to invigorate that force, and to make it

efficient for the purpose for which it was intended.

Parliamentary Debates 20th.Aug. 1839, Vol.49, c.436

Given that the traditional machinery had failed before without evoking calls for a new system of policing, the above extracts from the Parliamentary Debates, together with the rapidity with which the policing measures were passed in 1839, raises the question: What was special about the Chartist disturbances? Insofar as the conventional histories have commented on this, they have tended to suggest that the answer lies in their scale. However, large-scale disturbances had occurred before in 1831 and during the Luddite period and, in terms of the destruction of life and property, the events of 1839 were less serious than the Gordon Riots fifty years earlier. It was not, therefore, merely the scale of these disturbances which elicited a different response. We would suggest that a more important factor was the growth of an organised working class. With the growth of industrial capitalism, the working class had slowly grown in strength and begun to develop its own industrial and political organisations. The Chartist out-

breaks in 1839 were a clear demonstration of the potential threat that this posed, not just for the maintenance of social order, but to the structure of society more generally. In a period of rapid change and revolution on the continent, it is not difficult to imagine how both the bourgeoisie and the gentry might have been panicked into extending the new police to the counties.

This change in the nature of class struggle would certainly explain why the traditional system was not replaced earlier. For the majority of people living in Britain in the C18th, the market was an important focal point(78) which formed an arena for the channelling of local grievances(79) such as riots over the price of bread and a variety of other issues mainly in the sphere of consumption.(80) Although such riots were frequent, they lacked a conscious political direction. There is virtually no evidence to suggest that any riot in the years before the French Revolution aimed to bring about changes in the social structure. On the contrary, evidence from historical studies by Thompson, Hobsbawm, Rude and others

suggests that the C18th 'crowd' were trying to preserve traditional lifestyles, customs, culture and, indeed, a traditional economy. This is summarised well by Thompson when he says:

Hence one characteristic of the century: we have a rebellious traditional culture. The conservative culture of the plebs as often as not resists, in the name of 'custom', those economic innovations and rationalizations (as enclosure, work discipline, free market relations in grain) which the rulers or employers seek to impose. Innovation is more evident at the top of society than below, but, since this innovation is not some normless or neuter technological / sociological process ('modernization', 'rationalization') but is the innovation of capitalist process, it is most often experienced by the plebs in the form of exploitation, or the expropriation of customary use-rights, or the violent disruption of valued patterns of work and leisure. Hence the plebian culture is rebellious in defence of custom. The customs defended are the people's own, and some of them are in fact based upon rather recent assertions in practice. But when the people search for legitimations for protest, they often turn back to the paternalist regulations of a more authoritarian society, and select from among these

those parts most calculated to defend their present interests; food rioters appeal back to the Book of Orders and to the legislation against forestallors, etc., artisans appeal back to certain parts (e.g. apprenticeship regulation) of the Tudor regulatory labour code.

E. Thompson Eighteenth Century English Society
p.154 (original emphasis)

What Thompson is doing here is to summarise the nature of class struggle in the early period of capitalist development, characterised by enclosures and new market practices. Riots can be seen as a response to the changes emanating from this period but, as long as they were localised in defence of traditional practices, the traditional peace keeping machinery was able to cope reasonably well. In the 1790s, this situation began to change in that there was an element of political organisation in the food riots of this period.(81) Although Thompson is careful not to overstate this point(82), he argues that the food riots of 1795-1801 mark the end of traditional forms of protest and the beginning of a period of transition to new, more consciously political, struggles centred more and

more upon wages and production issues rather than consumer issues.(83) It was in this period that the old paternalism, which had been crumbling since before the French Revolution, finally snapped.

The forms of action which we have been examining depended upon a particular set of social relations, a particular equilibrium between paternalist authority and the crowd. This equilibrium was dislodged in the wars for two reasons. First, the acute anti-Jacobinism of the gentry led to a new fear of any form of popular self-activity; magistrates were willing to see signs of sedition in price-setting actions even where no such sedition existed; the fear of invasion raised the volunteers, and thus gave to the civil powers much more immediate means for meeting the crowd, not with parley and concession but with repression. Second, such repression was legitimized, in the minds of central and of many local authorities, by the triumph of the new ideology of political economy.

E. Thompson The Moral Economy of The English Crowd In The Eighteenth Century pp.128-129.

As a result, the last decade of the C18th and the first decade of the C19th witnessed the rapid abrogation of paternalist

legislation and its replacement with repressive legislation such as the Combination Acts of 1799 and 1800.(84) The repressive atmosphere of this period imposed an enforced secrecy upon the embryo working class movement which helped it to develop new forms of organisation which were manifested for the first time in the activities of the Luddites.(85) Thus Luddism marks an important step in the transition towards new forms of class struggle. Although, on the one hand, machine breaking was a reactionary attempt to hold on to a traditional way of life and as such can be seen as an extension of the 18th food riots, on the other hand, it was characterised by a relatively high degree of discipline(86) and: "One can see Luddism as a manifestation of a working class culture of greater independence and complexity than any known to the eighteenth century".(87)

Luddism and the agitation for Parliamentary reform which followed(88) helped to galvanise the working class on a national as well as a local scale and this imposed a far greater strain upon the peace keeping machinery than had the

Cl8th food riots. Initially, governments responded by resorting to the most draconian measures that were available within the traditional framework. During the Luddite period the industrial north and Midlands was flooded with troops.(89) Physical violence - most notably at St. Peter's Fields where 11 people were killed and a further 400 were injured - was also used against the parliamentary reform movement. The latter further provoked legislation, in the form of the Six Acts, which was designed to prevent any further mass meetings of workers. In this way, the traditional system survived both Luddism and the parliamentary reform movement but its resources had been stretched to the limit and weakened in the process (viz. the political embarrassment of 'Peterloo' and the subsequent reluctance to employ the army to quell civil disturbances).

When these resources were next tested in 1839, they were confronted with a better organised and more mature working class, in the form of Chartism, and they were stretched beyond the limit. Chartism was an autonomous, well-organised,

articulate working class movement adapted to the emerging industrial capitalist society, but the system of control was still rooted in C18th social relations. The Chartist outbreaks in 1839 exposed the need for new forms of policing capable of containing the protest of an organised industrial working class. This was clearly recognised by Russell. When introducing the County Police Bill, he makes the point that policing was not a problem in the boroughs because they had been able to create their own police forces under the powers of the Municipal Corporations Act:

But many districts in the counties had in the present time come to be thickly populated with a manufacturing or mining population, which partook of the character or nature of a town population, while, at the same time, it was impossible to confer upon them municipal institutions.

Parliamentary Debates 24th July 1839, c.730

In this passage Russell is equating the need for a county police force with the development of an organised industrial working class. Although this connection is not often made

explicit during the parliamentary debates, it is clear from the above discussion that it was this dimension to Chartism (rather than the extent of the outbreaks per se) which explains the sense of panic in 1839. The realisation of the strength of the organised working class also explains the lack of opposition to the policing measures passed in 1839 and 1840. The existence of a potentially revolutionary working class posed as great a threat, if not greater, to the position and property of the gentry as it did to the bourgeoisie. Thus, whereas the gentry had been prepared to resist handing over the reins of local government, they could no longer afford to cling to the traditional system for the maintenance of order. In the early C19th, when the weaknesses of the system had been exposed by 'politicised' food riots and Luddism, they had responded by strengthening the traditional machinery and introducing harsher legislation. The events of 1839 revealed that it was not possible to strengthen the existing system sufficiently to deal with the organised working class and the extension of the new police to the counties was accepted by the gentry without opposition.

Thus, we can see that the birth of the new police was not a simple reflection of bourgeois interests in the protection of property and the control of working class culture. Rather, it was the product of the particular social formation that existed in Britain in the mid-C19th and the complexities of the class struggle to which it gave rise. The central point is that the industrial bourgeoisie did not become the dominant political force in Britain until some time after the formation of the new police. In the period with which we are concerned, the gentry retained political control and this had a significant influence on the nature of reform. In the above discussion, we have focussed largely on the effect that this had on the timing of reform. The initial stages in the birth of the police (i.e. in 1792, 1800 and 1829) applied exclusively to London - where policing had not been in the hands of the gentry - and it is perhaps not surprising, therefore, that there was little opposition to these measures. The same applies to the policing clause in the Municipal Corporations Act, but the County Police Act in 1839 appears to have struck deep into the flesh of gentry authority by divesting trad-

itional powers from the county magistracy. We have suggested that the gentry were forced to accept this change because of the threat from an organised working class which exposed the inadequacy of the traditional machinery of order maintenance rooted in eighteenth century social relations.

A measure such as that passed in 1839 could not have been passed without, at least, the tacit acceptance of the gentry. However, the gentry did not simply influence the timing of reform. Their continued political dominance also had an important impact on the form taken by the new police. The county policing measures passed in the C19th represent a compromise between the bourgeoisie and the gentry. This is suggested by the fact that the County Police Act (1839) was not compulsory and, therefore, enabled magistrates in the industrial counties to create a police force whilst leaving those in the more rural, agricultural areas to continue with the existing machinery. Similarly, the fact that the Amendment Act in 1840 was designed to enable magistrates to create police forces only in those parts of their counties that were

industrialised, is further testimony to the impact that the gentry had on the nature of police reform. Again, in 1856, the need to appease the gentry can be seen in the way that Grey "bought off" the county magistracy by offering substantial grants to those benches who submitted to Home Office control in setting up a county police force.

However, the impact of the gentry went further than this. They did not simply use their power to delay the creation of a nationwide police force or to secure financial benefits from central government. More importantly, they were able to influence the particular form taken by the new police. Thus, although the 1856 Act led to the creation of police forces in all counties in England and Wales under the nominal control of the Home Secretary, county magistrates retained considerable control over the administration of the forces in their counties. Not only were they to be responsible for the recruitment and dismissal of Chief Constables but, they retained control over operational decisions concerning the deployment of both the army and the police in dealing with

local disturbances.(90)

Summary

The first half of the C19th witnessed a change in the nature of magistrates' policing function, resulting in the replacement of the traditional system, based upon deference and paternalism, with the modern, uniformed, professional police force. This was not a natural development forming part of a process of 'civilisation' or 'industrialisation'. Rather, it was a product of the class struggle arising from the particular social formation of nineteenth century British society. This is not to suggest that it was a simple reflection of bourgeois interests in the protection of property and the control of the working class. These were important dimensions to police reform, but the process was more complex than this. In particular, the gentry retained their political dominance throughout the period of the birth of the new police and legislation could not have been passed without their consent. We have suggested that the threat of an organised working class compelled the gentry to accept the need for reform of

the system of order maintenance which explains why the Police Acts were passed at such an early stage in the C19th with little opposition from the gentry representatives in Parliament. However, the role of the gentry was, not merely to influence the timing, but also, the particular form taken by the police in Britain which allowed them to retain an element of control over the administration of the police, the remnants of which can still be seen today.

In the next chapter, we will continue our analysis of the transformation of the magistracy in the C19th by looking at the extension of summary justice and the way in which this, too, was significantly influenced by the continued political dominance of the gentry.

CHANGES IN THE MAGISTRATES' COURTS
AND THE SYSTEM OF PROSECUTION

Introduction

In the two previous chapters, we have seen that, during the 19th, magistrates had been replaced in their traditional functions of local government and policing by new forms in which they had a reduced role. Most commentators have interpreted this as a straightforward decline of the magistracy. For example, Hazeltine says:

At the present day the office of Justice of the Peace, not only in the British Isles but elsewhere, is in the process of decay; its functions usurped by other institutional machineries; and it is not impossible, indeed, it is probable, that in the course of time this heritage from the Middle Ages, at least in the form in which it has filled so much of history, is destined to disappear from the life of society, taking its place among those institutions of the past which men study in order to understand the course of historical development that

has produced the local government of their day.

H. Hazeltine General Preface to E.G. Dowdell

A Hundred Years Of Quarter Sessions p.xliii

Although not many of the conventional histories have gone as far as Hazeltine in predicting the total disappearance of the magistracy, there is a widespread tendency to portray the history of the magistracy in linear terms as reaching a peak in the C18th and then declining steadily in the C19th and C20th. The major problem with this view is that it is one-dimensional i.e., its focus is exclusively on the policing and administrative powers which magistrates are assumed to have lost, whilst ignoring the transformation that was occurring in the nature of their judicial function. However, at the same time as they were losing their traditional functions, magistrates' courts were reformed and granted extensive powers of summary jurisdiction. This is not to suggest that these judicial powers balanced the loss of their policing and administrative powers. The magistracy was less powerful as a result of the changes that occurred during the

C19th but magistrates did not simply suffer an absolute loss of power. Rather they underwent a metamorphosis resulting in the emergence of a new legal form for the magistracy. In this chapter we will examine in detail the changes that occurred in magistrates' judicial function. As in our earlier discussions, we will argue that this development was closely related to the rise of industrial capitalism and the growth of the bourgeoisie, but, again, we will show that, in order to understand the precise nature of the form that emerged, this development must be located within the context of the struggle between the bourgeoisie and the gentry.

The Social Composition Of The Magistracy

One way in which the English magistracy changed with the expansion of industrial capitalism was through the inclusion of industrialists on the magistrates' bench. During the C18th the magistracy had been the exclusive preserve of the gentry and the aristocracy. The criteria for appointment as a magistrate were summed up by the Duke of Wellington when he said that magistrates must be "gentlemen of wealth, worth, consid-

eration and education ... they should have been educated at the bar if possible, and ... above all, they should be associated with, and, respected by the gentry of the county."(1) In this speech Wellington was speaking on behalf of the vast majority of the county magistrates throughout the country who still felt an intense hostility towards the idea of appointing men of trade to the county bench.(2) Even when the Lord Lieutenant of a county was disposed to appoint such a person, he was likely to meet with considerable opposition from the existing magistrates. "In 1838, for example, the magistrates of the Bala district of Merionethshire 'went on strike' to protest the appointment of a wealthy local landowner who had, within their recollection, operated a retail shop and who was a Methodist."(3) Zangerl goes on to say that Thomas Hogg, the government inspector who reported this episode, thoroughly approved of their action.

They objected to this individual, not so much on account of religious differences, which might possibly be overlooked, but because his origin, his education, his connections, his early habits, occup-

ations, and station were not such as could entitle him to be the familiar associate of gentlemen. The refusal of the County Magistrates to act with a man who had been a grocer and is a Methodist is the dictate of genuine patriotism; the spirit of aristocracy in the county magistracy is the salt which alone preserved the whole mass from inevitable corruption.

Quoted in C. Zangerl The Social Composition of The County Magistracy In England And Wales, 1831-1887
p.120

During the C18th, the gentry had been very successful in maintaining the social exclusivity of the county benches but, although they continued to resist the appointment of men of trade, this became increasingly difficult during the C19th. In agricultural counties it was comparatively easy for the gentry to maintain their dominance(4) but, in the early C19th, this was no longer the case in the more industrialised counties.(5) The landscapes of large parts of the latter counties came to be dominated by industry (coal mines, iron works, factories, mills, etc.) and its by-products turning them into undesirable residential areas for the gentry who migrated to more rural

surroundings. This created severe problems for the Lords Lieutenants of these counties because, on the one hand the new industrial regions were the areas with the highest crime rates but, on the other hand, there was a sharply decreasing supply of 'suitable' candidates for the magistrates' bench in these areas.

With the advantage of hindsight the appointment of industrialists to the bench appears to be an obvious solution to this dilemma but the Lords Lieutenants of these counties strongly resisted this logic and searched desperately for more acceptable alternatives. One strategy was to attempt to increase the volume of work carried out by the existing magistrates. In Lancashire, for example, an intermediate sessions was introduced for the Salford Hundred (the most industrialised division of the county) in an attempt to cope with the increased workload but it did little more than scratch the surface of the problem.(6) Some Lords Lieutenants looked to the appointment of stipendiary magistrates as a more effective method of dealing with the increase in magistrates'

judicial business without resorting to the appointment of industrialists. As a result stipendiaries were appointed for Manchester and Salford (jointly) in 1813, the Staffordshire potteries in 1839, Merthyr Tydfil in 1843(7) and South Staffordshire in 1854. Stipendiaries though were a far from ideal solution. Not only were they unable to cope with the volume of magisterial business on their own but, they posed a threat to the tradition of the unpaid, lay, landowning gentleman magistrate and, in any case, the government was likely to refuse the necessary legislation to enable the appointment of a stipendiary.(8)

Probably the most convenient solution to the Lords Lieutenants problem and certainly the most preferred was to appoint members of the Anglican clergy.

Appointing clergy to the Bench would carry a number of advantages for the Lord Lieutenant: they were not connected with any trade or business; they were resident in their parishes; they had the time to spare to attend to a magistrates' duties, and were said to be conscientious in their performance of those duties; and they were socially acceptable to

the gentry as companions on the Bench.

D. Philips The Black Country Magistracy p.171

Large numbers of Anglican clergy were appointed to the magistrates' bench in the early C19th with the result that by 1831 they comprised one quarter of all the J.P.s in England.(9) However, after 1835 this was no longer possible because of the Whig Government's firm policy not to appoint clergy as part of its attempt to redress the political balance of the county benches - clerical magistrates were felt to strengthen the already predominant Tory and Anglican presence on the Bench.(10)

Having exhausted all of the possible alternatives and faced with the continued pressure from Lord Russell (Home Secretary 1835-1839) who "acceded to the Reformers' demands and used his influence to challenge the landed monopoly of the county Benches", (11) the Lords Lieutenants of the industrialised counties were forced to appoint industrialists to the Bench in ever increasing numbers after 1835. In fact, the effects were not uniform throughout the country. In the most industrialised

counties the new industrial capitalists soon constituted a majority on the county benches(12) but, in the less industrialised counties the appointment of industrialists was a far slower and slightly different process. Rather than the gentry simply being displaced by the bourgeoisie, these counties witnessed a merger between them. On the one hand landowners began to invest in coal, railways, breweries and other industries thus, at least to some extent, embracing industrial capitalism. On the other hand, many of the wealthier manufacturers and industrialists began to sell their business interests and/or buy land in an attempt to establish themselves as country squires.

In fact, the altered composition of the county magistracy, if viewed simply as a statistic, fails to convey the extraordinary adaptability and flexibility of the landed classes. Class barriers did not disappear - instead, they were lowered. By gratifying the social and political aspirations of the upper middle-class individuals, the landed classes were responding realistically to changing social conditions. Assimilation, rather than disturbing the established order of social relation-

ships, reinforced the value system of the landed classes. The circle of landed allies on the county bench merely expanded to include bourgeois individuals as well as Anglican clergymen, doctors, barristers and military officers.

C. Zangerl The Social Composition of The County Magistracy In England And Wales, 1831-1887 p.125

Although the changes in the composition of the magistracy were not uniform throughout the country, the bourgeoisie were, nevertheless, being assimilated onto the county benches. We can further see that the bourgeois magistrates used their new-found power to protect their own interests. This was evident from the very beginning of the 19th in the way that they enforced the Combination Laws. Although these laws were supposed to apply equally to both employers and employees, in practice, they were only used against combinations of employees.

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Parliament did not concede much to the working classes, but the concessions, such as they were, lost all their value from the refusal of the magistrates to carry out legislation that was obnoxious to

the masters.

J.L. & Barbara Hammond The Town Labourer p.46

The Hammonds go on to suggest that many magistrates also used the Vagrancy Laws to suppress the embrionic working class organisations of the very early C19th.

They were used to put into prison any man or woman of the working class who seemed to the magistrates an inconvenient or disturbing character. They offered the easiest and most expeditious way of proceeding against anyone who tried to collect money for families of locked-out workmen, or to disseminate literature that the magistrates thought undesirable.

J.L. & Barbara Hammond The Town Labourer p.46

Later in the C19th industrialists used their position on the magistrates' bench to enforce other industrial legislation in a similarly partial manner. When discussing the Master and Servant Act (1823) - which, in theory, provided remedies for breach of contract of employment by both employer and employee - Philips says that, in practice, it was used by the manufac-

turing magistrates in the Black Country as a weapon against trades unions and strikes.

If workers left their master's service before the end of their contract, by going on strike, they were open to prosecution. Black Country coal and iron masters brought such prosecutions against striking miners and ironworkers. The threat of the Act forced the miners, in their large strikes, to give two weeks' notice of their intention to strike, to avoid prosecution. The coal and iron masters made more use of their powers granted in the Act, not merely keeping it in reserve as a threat, than any other industry.

D. Philips The Black Country Magistracy p.180

Similarly, in his discussion of the 1831 Truck Act, Philips shows that a number of wealthy coal and iron master magistrates were able to ignore this legislation and even continue to operate their own 'tommy' shops. This Act was particularly difficult to enforce because it specifically prevented magistrates who were either coal and iron masters themselves or who were connected with them from hearing cases under this Act. In industrial areas such as the Black Country this often excluded

virtually the entire magistracy. R.H. Horne (the Children's
Employment Sub-Commissioner) noted in 1843 that:

Since the passing of the (Truck) Act nearly every one of the magistrates in the vicinity (of Bilston, a particularly bad area for truck) have always been mine-owners or ironmasters, or connected with those who were in such trades. There is at present only one magistrate in Wolverhampton (there are no magistrates in Bilston) really empowered in a strict legal sense, to act in a truck case. Several magistrates, however, have acted from time to time; and as those were directly or indirectly in the coal or iron-trade, they naturally would not offend the influential master by a conviction if they could avoid it. Hence they discouraged informations, and pacify the poor man by moralising - 'My man, you know you have had your master's goods: and surely you ought to pay for them, you know'. It is therefore considered almost a sin, and little short of an attempt to defraud, when anyone seeks a conviction in a truck case.

Quoted in D. Philips The Black Country Magistracy
p.183

Even when magistrates could be found to try cases under this Act, they were often reluctant to convict and, when they did

convict, the penalties were usually light.(13) Further evidence of the way in which industrial magistrates were able to use their position to protect their own interests is provided by Marx in his discussion of the workings of the 1844 Factory Act which was supposed to limit the working day of children. Marx shows that the Factory Inspectors continued their legal proceedings against the use of the relay system whereby children were employed beyond the legal limits:

But what was the good of summoning capitalists when the courts, in this case the county magistracy - Cobbett's 'Great Unpaid' - acquitted them? In these tribunals, the masters sat in judgement on themselves. An example. One Eskrigge, cotton spinner, of the firm of Kershaw, Leese and Co., had laid before the Factory Inspector of his district the scheme of a relay system intended for his mill. Receiving a refusal, he at first kept quiet. A few months later, an individual named Robinson, also a cotton spinner, and if not his man Friday, at all events related to Eskrigge, appeared before the borough magistrates of Stockport on a charge of introducing the identical plan of relays invented by Eskrigge. Four Justices sat, among them three cotton spinners, at their head was the inevitable Eskrigge. Eskrigge acquitted

Robinson, and was now of the opinion that what was right for Robinson was fair for Eskrigge. Supported by his own legal decision, he introduced the system at once into his own factory.

K. Marx Capital Vol.I, p.274

However, although the above evidence reveals that the bourgeoisie used their judicial powers to further their own interests, we cannot leave our analysis here. The class nature of the C19th magistracy did not lay simply in the abuse of magisterial power. Rather, the nature of this power was itself transformed in the mid-C19th and in order to fully understand magistrates' judicial role, we must examine the new form taken by the magistracy.

The Reform Of Court Procedure

In the first half of the C19th central government strengthened its control over magistrates' courts by clarifying their jurisdiction and regulating their procedures. During the first half of the C19th legislation was passed to distinguish the jurisdiction of Quarter Sessions from that of the Assizes.

This was a process that had been started by Peel in the 1820s but the most important measure came in 1842 with the passing of the Jurisdiction of Justices Act. This Act stated that certain special offences likely to lead to local excitement - cases arising out of combinations amongst trades, the Municipal Reform Bill, and the Parliamentary Reform Bill - should be tried by jury at the Assizes. It also transferred a number of non-capital offences from the Assizes to the Quarter Sessions. Perhaps most importantly though, it stated that all offences punishable by death or transportation were to be dealt with by the Assizes.(14) In fact, magistrates had, in practice, already stopped trying the more serious cases and they had not normally tried capital offences for about 200 years.(15) Nevertheless, the Act is important because it clarified the legal limits of magistrates' jurisdiction and because it is indicative of central government's intention to impose stricter controls upon the administration of magistrates' justice.

Of far greater significance in this respect was the legis-

lation introduced in 1848 governing the procedures of Petty Sessions. This consisted of four Acts: one of which dealt with the powers of J.P.s to deal with people charged with indictable offences and was concerned simply with their power to issue warrants(16); another was concerned with protecting magistrates from prosecution for anything done in the course of their duty unless malice could be proved(17); and a third Act (passed in 1849) enabled (but did not compel) the erection of purpose built courtrooms(18). The most important of the four Acts though was the Summary Jurisdiction Act which dealt with the manner in which magistrates conducted their affairs within the courtroom. The Act states that:

the room or place in which such Justice or Justices shall sit to hear and try such Complaint or Information shall be deemed an open and Public Court, to which the Public generally may have Access, so far as the same can conveniently contain them; and the Party against whom such Complaint is made or Information laid shall be admitted to make his full Answer and defence thereto, and to have witnesses examined and cross-examined by Counsel or Attorney on his behalf; and every Complainant or Informant in

any such Case shall be at liberty to conduct such Complaint or Information respectively and to have Witnesses examined and cross-examined by Counsel or Attorney on his behalf.

11 & 12 Vict. cap.43

These four Acts did not constitute a complete reform of the procedure inside magistrates' courts - Justices still did not have to hold their sessions in prescribed buildings and clerks were still paid a fee rather than a salary(19) - but they, nevertheless, provided the basic framework of the modern magistrates' court.(20) The Summary Jurisdiction Acts mark the end of magistrates autocratic power in the courtroom(21) by making magistrates' courts formally open and giving them the appearance of an independent judicial body.

A number of the conventional histories have identified this legislation as being of paramount importance in the history of the English magistracy and the English legal system but they have made no attempt to explain it. Rather, as we have seen in our discussion of Osborne's account (See Chapter Three) they have tended to see it as an inevitable stage in the evolution

of the ideal legal system that is assumed to exist in modern Britain. For example, Tobias, when concluding his chapter on C19th law and criminal courts, says:

The criminal law of England and Wales, in the period of which we have been speaking, undoubtedly had some defects; but even at the beginning of that period it can be said to have been a system worthy of a free country.

J. Tobias Crime And Police In England 1700-1900
p.138

The idea that the reform of court procedure was inevitable receives some support from the Parliamentary Debates (or to be more precise, the lack of debate) on these measures. Thus, when asking for leave to bring in the Bills, the Attorney General said:

Though there might be difference of opinion in the House as to the expediency of intrusting to the unpaid magistracy the large powers they now possessed, all must agree that it was the bounden duty of the Legislature to afford all possible assistance to gentlemen who discharged such duties

as were devolved upon them.

Parliamentary Debates Vol.96, 3/2/1848, c.4

The fact that no opposition was voiced at this stage and that the Bills passed their second and third readings with no discussion at all,(22) may appear to lend weight to the assumption that they were part of the inevitable march of progress. However, this does not explain why the change occurred at this time. Unfortunately, the lack of debate on these measures in Parliament makes it difficult to identify the precise positions of the gentry and the bourgeoisie on this issue. Nevertheless, it should be clear from the previous two chapters that this period was characterised by the conflict between these two groups and it is possible to explain the Summary Jurisdiction Acts in these terms. Thus, what Osborne sees as an 'incomplete' stage in the evolution of the modern magistrates' court can be better explained as a compromise reflecting the balance between bourgeois and gentry interests. On the one hand, the restrictions that were placed on the administration of magistrates' justice reflect the bourgeois

principle of regulation through a formally neutral state and, on the other hand, Pakington was able to thank the Attorney General for 'his most praiseworthy effort' in introducing a measure which did not constitute a serious challenge to the authority of the gentry but enabled them: "to execute their various functions without being subject to various prosecutions and actions in the honest performance of their duty." (23)

The Growth of Magistrates' Summary Jurisdiction

Regardless of the precise nature of the compromise between the gentry and the bourgeoisie, the Summary Jurisdiction Acts established the broad framework of the modern magistrates' court. However, although the incorporation of the magistracy into the state apparatus appeared to guarantee the operation of due process in magistrates' courts, this was only one side of the transformation that occurred. At the same time as their procedures were regulated by central government, magistrates' judicial function was also expanded enormously by the extension of their summary powers of jurisdiction which involved

the abandonment of the principles of due process involved in jury trials.

This was not an entirely new development. As we have seen, magistrates had powers to try minor offences summarily in Petty Sessions in the early C18th (eg. under the Game Laws and the Vagrancy Laws). In the latter part of the C18th, following largely from the recommendations of Henry Fielding, these powers were extended further.(24) Radzinowicz notes that a multiplicity of Acts gave magistrates powers to hear and decide, sometimes without appeal, an ever-growing number of cases:

And notably cases relating to Customs and Excise; stamps; the Game Laws; pawnbrokers; friendly societies; highways; hackney coaches, carts and other carriages; hawkers and pedlars; Quakers and others refusing to pay tithes; appeals of defaulters in parochial rates; misdemeanours committed by persons unlawfully pawning property which was not theirs; bakers for short weight, and coal merchants; labourers not observing their agreements; alehouse

keepers keeping disorderly houses; nuisances under several Acts of Parliament.

L. Radzinowicz A History Of English Criminal Law
And Its Administration From 1750 Vol.2, p.270, fn.2

However, for the most part, the extension of magistrates' summary powers in the C18th was based upon an expansion of their traditional involvement in county administration and peace keeping. It was not until the late C18th and early C19th that the net of summary jurisdiction was thrown more widely to include minor property offences which had previously been dealt with in the higher courts. The early moves in this direction were a direct result of the abolition of capital punishment which began in the late C18th and early C19th through the campaigning of Samuel Romilly(25) and reached a climax during Peel's term as Home Secretary in the 1820s. Peel passed a number of Acts which extended the scope of magistrates' summary powers. An Act of 1826 made the stealing of deer, hares, dogs, fish, beasts and fruit trees (in certain circumstances) summary offences. Another Act of 1827 made damaging trees, fences, etc. (in certain circumstances)

summary offences and, in 1828, he passed another Act making common assault and some other assaults summary offences.(26)

The most important of his measures, though, was the Criminal Law Consolidation Act (1827) which abolished the distinction between grand larceny and petty larceny. This Act not only abolished capital punishment for the former but, more importantly, made all larcenies summary offences triable by two J.P.s sitting in Petty Sessions.(27)

This legislation passed by Peel has an important place in the history of criminal law because of its role in the abolition of capital punishment(28) but it was also important in so far as it broke new ground for the magistracy. He:

transferred a vast volume of crimes from the jurisdiction of the assizes to that of quarter sessions and from quarter sessions to the justices of the peace.

L. Radzinowicz A History Of English Criminal Law
And Its Administration From 1750 Vol.1, p.573

By giving magistrates summary jurisdiction over a wide range

of petty thefts he took the first steps towards the development of the modern magistracy as a summary judicial body. However, at this time it would appear that this was largely a side effect of the abolition of capital punishment and it was not until later in the C19th that conscious efforts were made to transform the magistracy in this way. Between 1839 and 1855 a series of Bills were introduced proposing to extend magistrates' summary powers of conviction. The major proposals of each of these measures are summarised in Table One.

TABLE ONE

SUMMARY JURISDICTION BILLS 1839-1855

Summary Jurisdiction Bill(1839) - proposed to give magistrates summary jurisdiction over felonies.

Metropolitan Police Courts Bill(1839) - main proposal was that stipendiaries should be barristers who had served at least 7 years. It also proposed to give them summary powers to deal with petty larcenies - theft of anything valued at less than 40 shillings would be punishable by a fine of up to £5 or 3 months in prison. This clause was thrown out by the Lords.

Juvenile Offenders Bill(1840) - proposed to give magistrates summary jurisdiction over misdemeanours by children aged 12 or younger.

Infant Felons Bill(1840) - proposed to give Lord Chancellor power of transferring children who had been convicted of felonies to the care of benevolent persons who would undertake to educate and provide for them.

Petty Sessions Bill(1841) - proposed to give magistrates summary powers over juvenile offenders. They would have been able to issue fines up to £5 in such cases.

Special Petty Sessions Bill(1842) - proposed to give magistrates summary powers over all defendants who pleaded guilty, regardless of age.

Juvenile offenders Act(1847) - allowed two magistrates sitting in Petty Sessions to try larceny offences by juveniles under the age of 14 where the goods stolen did not exceed 40 shillings in value. They were empowered to issue a maximum sentence of 3 months imprisonment but they could order a whipping as an alternative.

Juvenile Offenders Bill(1849) - proposed that a large number of larcenies by juvenile offenders in which the value of the goods stolen was less than 5 shillings should be triable summarily by J.P.s. Also proposed to extend magistrates' powers to issue a

flogging as an alternative to imprisonment to 16 year olds.

Juvenile Offenders Act(1850) - initially introduced as the Larceny Summary Jurisdiction Act proposing to give magistrates summary powers over all petty larcenies below the value of 1 shilling. The House of Commons rejected this proposal but agreed to extend the provisions of the 1847 Act to juveniles up to the age of 16 with the exception that the power to order whippings was not extended to 14 and 15 year olds.

Juvenile Offenders Bill(1850) - proposed the establishment of reformatory schools to which magistrates might send juvenile offenders and vagrant children.

Juvenile Offenders Bill(1853) - As Juvenile Offenders Bill(1850).

Public Prosecutors Bill(1854) - proposed to create public prosecutors to take the responsibility for prosecution away from the police and private individuals.

Criminal Justice Act(1855) - gave magistrates summary powers over all cases of simple larceny in which the value of goods stolen was less than 10 shillings and, in certain cases in which the value of goods stolen exceeded 10 shillings but the defendant pleaded guilty. They were empowered to issue

sentences of up to 6 months imprisonment, or up to 12 months in those cases in which the defendant had pleaded guilty to stealing goods worth more than 10 shillings.

Although most of these Bills were unsuccessful, three Acts gave magistrates extensive new powers to try cases of petty theft summarily in Petty Sessions. The Juvenile Offenders Act (1847) enabled magistrates to try juveniles under the age of 14 for theft offences where the value of the goods stolen did not exceed 40 shillings, the Juvenile Offenders Act (1850) extended the provisions of this Act to juveniles up to the age of 16 but the Criminal Justice Act (1855) broadened magistrates summary powers a good deal further.

It was an enormous extension of magisterial power for it had been estimated that, at the least, larcenies of up to five shillings constituted six out of ten of all cases that had been dealt with at Quarter Sessions.

L. Radzinowicz A History Of English Criminal Law
And Its Administration From 1750 Vol.5, p.622

This Act greatly increased the volume of business handled by the magistrates' courts. Between 1854 and 1857, the number of prosecutions for previously indictable offences increased tenfold.(29) Thus, although subsequent 19th legislation extended their summary powers still further,(30) the modern function of magistrates' courts as lower courts of summary justice was clearly established in 1855.

Those conventional histories that have referred to the extension of magistrates' summary powers have portrayed it, together with the general reform of the system of prosecution, as a triumph for common sense and humanitarianism. Thus, they frequently point to the inconsistencies resulting from defendants being acquitted because courts insisted on strict precision over the details of indictments. For example, Tobias cites the case of John Puddifoot who in 1830 stole a sheep.(31) The indictment accused him of stealing a ewe and he successfully fought the prosecution on the grounds that they were not the same thing. In a similar vein, Radzinowicz cites the case of Bartholemew Browne who was acquitted on a charge

of forging a cheque because he had signed it Bartw. Browne and the indictment read Bartholemew Browne.(32) Some of the implicit assumptions of the conventional histories emerge in the following passage.

In the first half of the nineteenth century a long series of Acts improved the criminal law by tidying up the tangle of complicated forms and procedures and relaxing their strictness. Most of the changes were technical matters which are probably not fully understood by anyone today, for it would be hardly worthwhile to pick one's way through the old law books and determine the exact meaning of all the out-dated expressions. It is, however, easy to see the importance of such changes as allowing juries to find someone accused of an offence guilty merely of attempting to commit it, if the evidence as the trial proceeded showed that the full act had not been completed. Another similar improvement was allowing a prisoner found in possession of stolen goods to be charged in the same indictment with alternative counts of stealing and receiving goods; it was obviously easier for the prosecution if this could be done, and it could hardly be considered unfair to say to a prisoner in effect, 'You have possession of something which you must have known did not belong to you, so you must have stolen it

yourself or bought it knowing it to be stolen.' This process of simplification was begun by Robert Peel when he was Home Secretary in the 1820s, but there was still some important work to do as late as 1861, in which year five major criminal law consolidation Acts were passed.

J. Tobias Crime and Police in England 1700 - 1900
pp.135-136 (my emphasis)

In this passage, Tobias portrays the reform of the system of prosecution as an unproblematic, purely 'technical matter' - a 'process of simplification' to remove the anomalies which 'obviously' had to be eliminated. We will see shortly that the process was, in fact, more complex than Tobias implies but let us first look at the second major element in the conventional accounts which arises in discussions of the abolition of capital punishment.

This can be seen most clearly in Radzinowicz's history of criminal law. He points out that, between 1805 and 1810 petty juries acquitted 1 in 4 defendants accused of capital offences(33) and he suggests that this was due to the fact that juries were often reluctant to prosecute for minor

property offences if they knew that the offence was subject to capital punishment. He makes the further point that court officials were prepared to engage in "pious perjury" to avoid capital punishment and he cites the following example from a speech by Thomas Fowell Buxton to illustrate the point.

Martha Walmsley was indicted for stealing 1 pair of silver shoe buckles, 2 pairs of leather shoes, 3 shirts, 3 other ditto, 3 aprons, a frock, a gown, a bedgown, 2 pair of hose and 2 curtains, with many other things, value £3 10 shillings; in the house of Henry Gruling. Court to prosecutor: "if you can fix the value under 40s. you will save the prisoner's life." Prosecutor: "God forbid I should take her life! I will value them at 8s". Guilty 8s.

Quoted in L Radzinowicz A History of English Criminal Law And Its Administration From 1750 Vol. I, p.95

Radzinowicz's account of these phenomena, together with his explanation of criminal law reform, suggests that they were the product of the growth of humanitarian feeling against capital punishment. Thus, he says:

Both the history of the English legal system and English constitutional as well as political experience show that the essential prerequisites of the success of any important reform are first that the social need for it should assert itself, and secondly that it be supported by an overwhelming section of public opinion. ... In the eighteenth and the beginning of the nineteenth centuries the generous exercise of the royal prerogative of mercy helped to redress the balance between the antiquated criminal law and the modern notions of guilt and punishment then beginning to take shape. As such it performed a valuable and markedly humanising function.

L. Radzinowicz The History of English Criminal Law
And Its Administration From 1750 Vol.1, p.137

Both elements of the conventional accounts point to significant developments but neither of them provide a sufficient explanation of the changes that occurred in the criminal law and the system of prosecution. Because they adopt a consensual model of C19th society, the conventional histories fail to consider the political formation that enabled the creation of new legal forms and, thus, understate the importance of what appears to have been a more decisive dimension - i.e.,

the protection of property.

Legal Reform and the Protection Of Property

Thus, although the early reformers stress the inhumanity of capital punishment, their arguments were by no means limited to the purely moral issues. Another important strand in the case that they presented was their argument that capital punishment was inefficient. They argued that, although it punished certain offenders severely, a much larger number escaped the net of punishment entirely which reduced its deterrent effect. The reformers therefore argued for a system of punishment which, although less harsh, would provide more certainty of punishment.

So evident is the truth of the maxim that if it were possible that punishment, as the consequence of guilt, could be reproduced to an absolute certainty, a very slight penalty would be sufficient to prevent

almost every species of crime, except those which arise from sudden gusts of ungovernable passion.

S. Romilly quoted in L. Radzinowicz A History Of The English Criminal Law And Its Administration From 1750 Vol.I p.330

In pointing to this dimension of the discourse of reform, we are not suggesting - as Foucault does(34) - that Romilly and the other reformers were without humanitarian motives. However, it was the arguments in terms of the inefficiency of traditional punishments that evoked the necessary support to obtain success in Parliament. Where legislation was passed it was because it was supported by the industrial bourgeoisie looking for more efficient methods of punishment in order to afford better protection to their property. Thus, one of Romilly's few successes - an Act passed in 1811 removing capital punishment for thefts from bleaching grounds in England - was passed because it was supported by a petition signed by 150 proprietors of bleaching grounds in Ireland and a large number of calico printers in England, saying:

That your petitioners property is much exposed, especially while lying out to bleach, and great depredations are annually committed on your petitioners.

That the laws which punish the offence with death have been found ineffectual to restrain these depredations, for that owing to the lenity of prosecutors, the unwillingness of juries to convict, and the general leaning to the side of mercy, when the punishment is by common opinion of mankind considered as disproportionate to the offence, very few convictions take place, and consequently offenders mostly escape, and are encouraged in the commission of crimes, which are multiplied from the probability of escape being increased, and from the impunity which lax prosecutions frequently afford.

That your petitioners are strongly impressed with the sentiment, that by certainty of punishment being substituted for severity of punishment, the number of crimes would be diminished, and your petitioners property better secured.

Quoted in L. Radzinowicz A History Of The English Criminal Law And Its Administration From 1750
Vol.I, Appendix 4, p.727

Again, in 1830, Peel's proposal to retain capital punishment for forgery was abandoned following opposition from bankers

who petitioned the House of Commons, saying:

That your petitioners, as bankers, are deeply interested in the protection of their property from forgery, and in the infliction of punishment on persons guilty of that crime.

That your petitioners find by experience, that the infliction of death, or even the possibility of the infliction of death, prevents the prosecution, conviction and punishment of the criminal and thus endangers the property which it is intended to protect.

That your petitioners, therefore, earnestly pray that your honourable House will not withhold from them that protection to their property which they would derive from a more lenient law.

Quoted in L. Radzinowicz A History Of The English Criminal Law And Its Administration From 1750
Vol.I, Appendix 4, p.730

Similar concerns can be seen to underly the extension of summary justice. As we have seen, conventional histories have suggested that the problems with the existing machinery lay primarily in the anomalies resulting from legal technicalities and reluctant juries. Tobias, for example, sees the reform of

the system of prosecution as a 'common sense' development to eliminate these anomalies but this fails to explain why it became problematic in the early C19th. If we examine this development more closely, we see that it was not as obvious as Tobias suggests. In fact, we find that he misrepresents the nature of the existing system. Although the anomalies that he and others have pointed to formed part of the inadequacy of this system, there was another, more serious, problem for the majority of prosecutors which lay in the inconvenience and expense that accompanied prosecutions. This problem has been summarised by Philips in his study of the Black Country.

If the prosecutor could ensure that he or some police officers found and apprehended a suspect, he would then have to gather witnesses who could testify to the offence. He and the witnesses would have to appear before the magistrate at the preliminary examination, for which they might have to travel some distance; the examination itself, plus the travelling and the waiting for other cases to be taken first, would mean that most of a working day would be taken up this way. If the magistrate committed the accused for trial, the prosecutor and his witnesses would have to be bound over for sums

of money - £40, £20, £10 - which they would forfeit if they failed to prosecute or give evidence. There would also be fees to be paid to the magistrates' clerk for issuing the warrant of arrest, taking the recognisances, and often for furnishing copies of the depositions.

The prosecutor and his witnesses would then have to travel to the county town at the time of the Quarter Sessions or Assizes. The relevant county towns for the Black Country were Stafford and Worcester; Stafford was between fifteen and twenty-five miles, and Worcester over thirty miles, from any Black Country town. They would have to find accommodation in the town, and stay there several days so as to be present at both the Grand Jury hearing (which took place at the beginning of the Assizes or Sessions) and the trial itself (which might be heard at any point in the Calendar - a crowded Sessions or Assizes could last for ten days). If the prosecutor made use of legal assistance for the case, he would have to pay for the services of a solicitor and/or a barrister. And there would be more fees - to the Clerk of the Peace (at Sessions) or Clerk of Indictments (at Assizes) for drawing up of the indictment, to the clerks and bailiffs for attending witnesses, swearing them in, etc. Even after the sentence, if the prisoner was found guilty, the prosecutor had to pay a fee to the Clerk of the Peace or Assize for the order committing the

prisoner to imprisonment or transportation; if he was acquitted or discharged, the prisoner had to pay a similar fee himself.

D. Philips Crime And Authority In Victorian England
p.111

In fact, as Philips points out(35), there was some provision to pay expenses: "prosecutors and witnesses in felony cases were reasonably well provided for, in terms of recovering their expenses incurred: during the trial, in preferring the indictment, and in appearing before the Grand Jury" but "there was no provision at all for prosecutors and witnesses in misdemeanour cases - even though these included offences such as: uttering base coin, obtaining property under false pretences, assaults, perjury, and most forms of riot". Moreover, "even for felonies there was no allowance for expenses incurred before the actual drawing up of the indictment."(36) The latter problem was largely remedied by the Criminal Justice Act (1826) which extended the area of recoverable expenses to include the cost of attending the committing magistrates' preliminary examination and allowed

these expenses to be awarded for certain misdemeanours. However, this Act did not cover all misdemeanours and, more importantly, if the suspect was not committed for trial then neither prosecutor, witnesses nor constables could recover their costs.(37) In addition, there was always some uncertainty as to whether prosecutors and witnesses would receive compensation: "people would sometimes find that for some technical reason they could not recover what they had paid out" and "a great deal depended on the attitudes of the judges and magistrates" - there was considerable variation in their willingness and generosity in granting expenses.(38)

Thus, despite the various attempts to remunerate prosecutors and witnesses and the fact that the new police force were able to detect and apprehend more offenders, it was still difficult to prosecute them because, the old system of prosecution was difficult to negotiate, expensive and subject to uncertainty. These difficulties had not prevented the gentry from punishing transgressors against their property because these offences were largely dealt with under capital statutes in the higher

courts but they constituted a major obstacle in the protection of the property of manufacturers and industrialists. This does not mean that working class prosecutors did not also benefit from the new system of summary justice, but rather that it was the bourgeoisie who were instrumental in getting legislation passed.

Debates On The Extension Of Magistrates' Summary Powers

As we have seen in the previous chapter, in the early C19th the bourgeoisie were not sufficiently strong to challenge the legal and political forms that had been developed by the gentry and changes were restricted to relatively minor modifications to the existing system, such as the abolition of a few capital statutes and the improvements mentioned above in the remuneration of prosecutors' and witnesses expenses. However, by the middle of the C19th, the relationship between the bourgeoisie and the gentry had altered. So too had the nature of the protection offered to gentry property. It was the combination of these two factors which underlay the extension of summary justice between 1847 and 1855.

Once again, we should emphasise that, in stressing the importance of the protection of property, we are not denying the existence of a humanitarian discourse. The early attempts to extend the scope of magistrates' summary powers appear to have been founded upon genuinely humanitarian concerns. For example, when Davenport introduced the Juvenile Offenders Bill in 1829 - proposing to give magistrates powers of summary jurisdiction in certain cases where juveniles were accused of petty larceny - he justified the measure on the grounds that the existing system necessitated the confinement of juveniles awaiting trial with hardened older criminals and that, as a result, many juveniles were initiated into vice.(39) Sir Eardley Wilmot also stressed this point in his evidence to the Select Committee on Criminal Commitments and Convictions in 1828(40) and, again, when speaking in the debate on the Summary Jurisdiction Bill(1839). After expressing his agreement with many of the objectives of the Bill, he said:

But with respect to that part which gave magistrates the power to inflict a fine of 5 for certain offences which were now felony, he thought it

necessary for the object of the Bill. There had been a great increase in crime, and it was found that that increase was very much owing to the early imprisonment of children in gaols with convicted felons. To avoid this, the present bill proposed, in some cases of juvenile offenders, virtually to convert what was a felony into a misdemeanour.

Parliamentary Debates Vol.47, 4/6/1839, c.1304

A second major strand in the humanitarian argument concerned the injustice of the fact that many defendants were detained in prison whilst awaiting trial for periods in excess of the appropriate punishment for their crime. This argument was presented by both Hawes and the Earl of Devon in support of the Metropolitan Police Courts Bill (1839). Speaking in this debate in the Lords the latter said:

as under the present state of law, persons might be committed to prison for four or five months before trial, it would be an act of justice to them to have their guilt or innocence decided at once without waiting so long in gaol; and that as persons might now be summarily convicted, even for going into a garden and pulling up a carrot, or for taking an apple, it would only be consistent with common

sense, that summary jurisdiction should be given to magistrates in other trifling cases of theft.

Parliamentary Debates Vol.50, 12/8/1839, c.189

In the early parliamentary debates concerning summary jurisdiction the humanitarian arguments were paramount and they also recurred on several subsequent occasions in later debates including those Bills which eventually became laws.(41) We should, nevertheless be wary of accepting them uncritically. We will see shortly that the humanitarian arguments were not the only, or even the decisive, arguments in the extension of magistrates' summary powers but we must also examine the humanitarian arguments themselves more closely. When Foucault discusses the criminal law reforms of the late C18th and early C19th, the debate is posed in terms of humanitarian motives versus attempts to exert new forms of control.(42) He suggests that the former are little more than a cloak to disguise the attempt "to insert the power to punish more deeply into the social body."(43) Apart from understating the significance of humanitarianism(44), Foucault also misrepresents it. In the

debates on the extension of magistrates' summary powers, the humanitarian arguments outlined above are inextricably intertwined with arguments reflecting a desire to exert a more effective control over the working class.(45)

This emerges in the speeches of Sir Eardley Wilmot (one of the leading 'humanitarians'). When introducing the Juvenile Offenders Bill (1840), he says that he did not believe that juvenile offenders were driven to crime by distress. He attributed it instead to a general ignorance, and:

more especially to ignorance of moral and religious duties, and to the absence of that sound discipline and control, without which, in early life, it would be vain to hope in any country for a well-ordered population.

Parliamentary Debates Vol.52, 26/2/1840, c.654

Thus, he argued that his Bill was not a Bill of punishment:

It was a bill to invest magistrates, not with an arbitrary power to inflict punishment, but to give them an authority similar to that which a master has over his apprentice, or a father over his son - a

moral authority, which would enable them to bring juvenile offenders under a course of moral training and discipline which should have the effect of reclaiming them to the paths of honesty and industry.

Parliamentary Debates Vol.52, 26/2/1840, c.653

Similar concerns were expressed by Milnes in the debate on the Juvenile Offenders Bill (1849), when he argued that, rather than mixing with undesirable company in prisons, they could be sent to special institutions based on Parkhurst which would be concerned with "improving the heart and awakening the conscience" of offenders.(46) And again by Adderly, when introducing the Juvenile Offenders Bill (1853). This Bill proposed to give the counties and boroughs the option of establishing reformatory schools to which young criminals could be sent:

...thus introducing a new treatment to a certain extent for such young criminals, namely, that of industrial training, and applying the principle of parental care and home influence to criminal children, instead of subjecting them to the process

of imprisonment in gaols.

Parliamentary Debates Vol.129, 1/8/1853, c.1099

The effects of all of these proposals would have been, and indeed eventually were, to exercise a much closer control over poor juvenile offenders. This does not mean that this motive was more important than the concern about the 'contamination' of juveniles in prisons which usually accompanied the above arguments but rather they were different strands of the same argument. Although the effects of these proposals might have been to increase control over working class juveniles, the motives of these men are best described as 'paternalist'. For Eardley Wilmot and the others mentioned above this increased control was seen as part of a genuine attempt to improve the quality of life of juvenile offenders. Nevertheless, in the same way that Foucault is wrong to dismiss the humanitarian arguments as a veneer for the introduction of new forms of control, we can see that Radzinowicz and others are equally mistaken in their portrayal of the 'humanitarian' discourse.

More importantly, though, it is clear from the Parliamentary

Debates that the 'humanitarian' arguments were not decisive in the extension of summary jurisdiction. Although the humanitarian discourse dominated the early debates, none of these Bills even came close to being passed into law. It was only later (in 1847, 1850 and 1855), when new arguments began to dominate, that legislation was forthcoming. At first glance it may appear that support for these measures was based on a concern to improve the workings of the criminal law. Thus, when seeking leave to introduce the Juvenile Offenders Bill (1847), Pakington refers to the Criminal Law Commission of 1837 which recommended that the most salutary mode of diminishing juvenile crime would be to entrust magistrates with certain discretionary powers. He points out that the reason for this was that the slightness of the offence and the youth of offenders coupled with the fact that they had already been to prison meant that they were usually rendered objects for compassion rather than fit subjects for punishment which meant that juries often acquitted or recommended mercy resulting in purely nominal sentences. Pakington continues by arguing that a similar problem existed amongst magistrates

who, when receiving an information, might act leniently in anticipation of the evils that lay ahead.

He would wish to remind the House what was the practice followed under the present law. Why, that magistrates were so impressed with the disadvantage and, he might say, cruelty, of sending those infants to gaol for long periods before their trial, that many of them felt it to be their duty to refuse receiving informations, though if they could deal summarily with the cases, they would not suffer the offenders to escape. On the other hand, other magistrates, entertaining a more strict sense of duty, felt bound to commit these offenders for trial. He need not point out to the House the inconvenience which must result from the inequality thus produced where the inequality ought not to exist, and of the extremely bad moral effect of humane magistrates appearing to hold out an impunity for crime.

Parliamentary Debates Vol.90, 23/2/1847, c.436

In a similar vein, when speaking in favour of the Criminal Justice Bill (1855), Lord Brougham said:

It was bad enough that the Lord Chief Justice should be called upon, when he went on circuit, bearing the Queen's Commission, with all the pomp and circumstance of the highest judicial authority, to adjudicate solemnly with the help of grand and petty juries upon larcenies to the amount of 1d or 2d; it was bad enough that all the parties should be put to great and unnecessary expense, both of time and money; but the worst evil of all - it might indeed be called an evil that surpassed all the rest put together - was, that persons were detained for many days, perhaps weeks in prison; and when they came to be tried were either acquitted, after being punished more severely than they would have been had they been convicted, and then it became impossible to award even an apparently just amount of punishment to them for this offence of which they had been found guilty, because the Judge would feel that they had already undergone, secretly and unknown to the public, a greater punishment than was due to them upon their conviction; and the consequence was, that often people saw with surprise that for an offence which properly deserved a greater punishment, a prisoner was dismissed with a day's imprisonment.

Parliamentary Debates Vol.136, 26/2/1855,
cc.1874-1875

Although, in the above speeches both Pakington and Brougham

allude to the humanitarian arguments, their concerns are different. They are not concerned so much with the injustices of the system of prosecution as its inconsistencies, inadequacies and inefficiencies. Given the prominence of these two men and the importance of their support, it might be tempting to suggest that the extension of magistrates' summary powers was part of a process of rationalization of the machinery of the criminal law. This is the conclusion that Tobias reaches, but a closer examination of the Parliamentary Debates reveals a baser concern with the protection of property interests underlying these arguments.

Immediately proceeding the introduction of the Juvenile Offenders Bill (1847), Brougham introduced a petition from the magistrates of Liverpool. In his speech he refers to the hardening of attitudes amongst juvenile recidivists and the expense of prosecuting them. Then he says:

When they considered the immense extent of manufacturing districts at present, they could not now go on with the same system of legislation they did formerly; they could not proceed in the same course

of punishment, with a view to reform offenders, that was pursued in former times. Since the days of the invention of Arkwright, the importation of cotton had increased eighty two fold. Instead, therefore, of having only a few thousand operatives employed, there were now 800,000; some said 1,500,000. There were at present, 300,000 hand-loom weavers. Why did he recite these facts? For this reason, that machinery was constantly invaded by manual power; there was a perpetual struggle going on between both. God forbid that he should object to machinery, because the more machinery carried the day, the more men would get employment, and that in the end would be an advantage to the factories and the workmen. Ay, but not immediately; there would be an interval. When the power looms threw 100,000 hand-loom weavers out of work, and when a single boy or girl could do four times as much as the strongest man by the power loom, there was of necessity an interval, until the effects were allowed time to subside, and there was now going on the same struggle between those two powers, the power of machinery and that of manual power. What was the consequence of that struggle before? Those who were thrown out of employment were prone to get into bad practices, for it was a grievous consideration that those who were employed in the factories, at the rate of 25 shillings or 30 shillings a week, made no provision for the 'bad day'; and the consequence was, when thrown out of

employment, they fell into bad habits. But such conduct on their parts, so far from being an apology for their Lordships to dispense with their duty, was a reason why it should be sedulously and diligently performed; and therefore he asked that the criminal law should be so modified as to make it subservient to the reformation of criminals.

Parliamentary Debates Vol.90, 18/2/1847, cc.200-201

Brougham phrases his arguments in terms of the struggle between 'manual power' and 'machine power' but what he is, in fact, describing is industrial capital's attempt to impose the discipline of factory production. Moreover, although he does not express it in quite these terms, he clearly relates the need for criminal law reform in general, and the reform of the system of juvenile justice in particular, to the growth of industrial capitalism and the consequent increase in 'bad habits'. Brougham's speech is interesting because he relates the need for an extension of summary jurisdiction to the wider development of industrial capitalism. However, he appears to be alone in taking such a broad view and there is no evidence to suggest that this was an important argument in the

extension of magistrates' summary powers. The decisive arguments in the passing of legislation between 1847 and 1855 appear to have been based on a more immediate concern to protect property. Thus, when introducing the Larceny Summary Jurisdiction Bill (1850) (which eventually became the Juvenile Offenders Act), Pakington argued for an extension of magistrates' summary powers of jurisdiction on the grounds that it was necessary to deal with the theft of coal.

One class of offences that was more particularly adverted to in this part of the Bill, was that of the offence of coal stealing. In some counties the offence was very common; but offenders were brought to trial at great cost, and on account of the insignificant nature of these charges, justice was frequently dispensed with altogether. In and near Dudley, where there were many coalworks, offences of this kind were either passed over and forgiven, or the persons were tried at the Worcester quarter sessions, twenty six miles distant. A coalowner told him that he was plundered of many tons of coal per week, owing to the difficulty of prosecuting offenders.

Parliamentary Debates Vol.108, 20/2/1850, c.1130

Pakington was supported in this debate by Sir John Jervis (the Attorney General), who said:

There were many good reasons why they should give two magistrates the power of summary jurisdiction in the case of smaller offences. Take the case of coal-owners. They were subjected to great loss by the theft of coal, and they submitted from time to time to the injury rather than prosecute; till, at last, they found themselves compelled to prosecute against some person for theft of an article amounting perhaps, to no more than a penny in value. If, however, the magistrates had the power of summary jurisdiction in such cases the evil would have been put an end to.

Parliamentary Debates Vol.108, 20/2/1850, c.1133

The above extracts from the Parliamentary Debates offer an interesting insight into the extension of summary justice in the mid-C19th because we can see that the support from prominent figures such as Pakington and Brougham was not based simply on a desire to rationalise the system of prosecution (see above) but that, underlying this argument, was a concern to provide a more efficient method of prosecution to afford

better protection to capitalist property. However, we should be careful to avoid oversimplifying the process through which this legislation was passed. We have already seen that a humanitarian discourse was also present in the Parliamentary Debates and we should not overlook the fact that, throughout the debates, there was continual opposition to the extension of magistrates' summary powers. Sometimes the arguments put forward were idiosyncratic(47) and there were also a special set of arguments which applied to stipendiary magistrates(48) but otherwise this opposition can be grouped into three categories. Firstly, there was opposition on the grounds that it would necessitate more petty sessions which, in turn, would impose an additional burden of expense on the county rates.(49) Secondly, it was opposed on the grounds that magistrates were not to be trusted with any increased powers. This emerged in the debate on the Juvenile Offenders Bill (1840) when Hume said that:

He objected to summary punishment. Magistrates had frequently oppressed the poor, and might do so again. ... Magistrates had enough power in their

hands and he was unwilling to increase it.

Parliamentary Debates Vol.53, 29/4/1840, c.1137

Hume was followed by Wakley who said that:

He had seen a great deal of justices, and he would say that a more incompetent body of men could nowhere be found. A body of men more characterised by ill-temper, faction and the most besotted ignorance, could not be found than the justices of the peace of the country.

Parliamentary Debates Vol.53, 29/4/1840, c.1138

Similar sentiments were expressed again by Roebuck when opposing the Juvenile Ofenders Bill (1847). He objected that:

The proceedings were to be in secret; there was no responsibility attached to the uninstructed party who was to judge and determine the nicest points of law. He might act as he pleased; and who was to determine whether he decided rightly or wrongly? These extraordinary powers were to be given, not to a learned judge, but it might be to a fox-hunting justice; and the trial might be conducted in such privacy that private passions, particular interests, and sinister motives might be put into motion to

carry out the wishes of particular parties.

Parliamentary Debates Vol.91, 28/4/1847, c.34

The third category of opposition which ran throughout the debates on this issue was to the very principle of summary jurisdiction because it involved the loss of the right to a trial by jury. This was voiced by Darby when the issue was first raised in the Summary Jurisdiction Bill (1839). He thought:

that the principle of the Bill was a very extraordinary one to come from the other side of the House. In the Quarter Sessions, they were not content with a full bench of magistrates, an experienced chairman, a jury, and a bar attending, as securities for the proper administration of justice, but they must also have a barrister presiding; whereas in this summary jurisdiction they would have no bar, no barrister, no jury - but leave the decision of a felony to two magistrates.

Parliamentary Debates Vol.47, 4/6/1839, c.1304

The same point was made during the debate on the Metropolitan Police Courts Bill (1839). Firstly, by Law:

But when great political and civil powers, and public and personal liberty are concerned, when the spirit of our ancient constitution, and the trial by jury, that great bulwark of purity of justice, were concerned, those who had promoted the Reform Bill had not been found wanting to abridge freedom, and place at the disposal of arbitrary functionaries the rights and liberties of the people. A more arbitrary measure than the present could not have emanated from the most despotic Power and Government that ever existed.

Parliamentary Debates Vol.49, 19/7/1839, c.533

And, again, by Lord Lyndhurst.

Trial by jury was to be taken away, and the power of trying and convicting solely rested in an individual appointed by the Crown, and removable at the pleasure of the Crown. But this was not all- it was to be left to the magistrate to say whether he would try the prisoner or not; therefore they would open the door to delay and partiality, and every species of mischief by adopting the clause.

Parliamentary Debates Vol.50, 12/8/1839, c.188

This argument was repeated again in the debate on the Juvenile

Offenders Bill (1840) by General Johnson and Sir G.

Strickland. The latter thought that:

the bill ... was of the most objectionable kind. It would, in fact, take the right of trial by jury from those who most needed that protection, and who could not be expected to be able to plead their own cause as well as those more advanced in years. He thought the magistrates were rightly trusted with the powers they had, but he was not inclined to extend their powers further, and to take away from the people the right to trial by jury.

Parliamentary Debates Vol.52, 26/2/1840, c.658

Even after the principle of summary jurisdiction had been accepted by Parliament with the passing of the Juvenile Offenders Act (1847) - which gave magistrates widespread summary powers to deal with juvenile offenders under the age of 14 - this argument persisted. It was repeated by Torrens M'Cullagh in the debate on the Summary Jurisdiction Bill (1850)(50), by Atherton in the debate in 1854 on the administration of criminal justice(51) and, by Chambers in the debate on the Criminal Justice Act (1855)(52).

It can be seen that the political alignments on this issue were complex. Not only were there a number of different facets to the discourse both in support and in opposition to the extension of magistrates' summary powers but also both the bourgeoisie and the gentry were divided. Thus, although a large section of industrial capital lent their support, it was opposed by the radical elements of the bourgeoisie (Hume, Wakley and Roebuck). The split amongst the representatives of the gentry is particularly interesting in view of their solidarity in opposition to the loss of magistrates' local government function. We have seen that on this issue Pakington acted as the leading spokesperson in defence of the traditional principles involved in the rule by gentry magistrates but on the question of summary justice he was instrumental in replacing the system of prosecution based upon the traditional principle of the right to a trial by jury which many of his gentry colleagues continued to defend. The fact that the extension of summary jurisdiction granted magistrates new powers rather than withdrawing them as in the case of the County Councils Act would perhaps explain why there was less

opposition on this occasion but it does not explain why Pakington and a section of the gentry were prepared to actively support and canvass in favour of a new system of prosecution. We would suggest that the answer to this question lies in the changing position of the gentry.

By the middle of the C19th, most of the capital statutes for thefts had been abolished and, thus, the gentry were no longer able to benefit from their ability to grant pardons. Moreover, with the rise of industrial capitalism, the gentry had itself changed. Whereas, in the C18th, their property had been almost exclusively in the form of land and their incomes derived from rents, during the C19th some sections of the gentry became increasingly involved in more industrial enterprises and they were suffering from the same depredations as the industrial bourgeoisie. This would explain why Pakington supported the extension of magistrates' summary powers despite the fact that it entailed the erosion of trial by jury. He was representing the interests of that section of the gentry which were beginning to "industrialise" through the development of the

mineral resources on their land. Thus the fact that they chose to support their argument with reference to the interests of coalowners is particularly significant because this was the major industrial enterprise in which the gentry engaged. Moreover, it reflects the struggle between property rights and use rights. During the 18th century access to coal had been considered a perquisite of miners and their families but, with the advent of industrial capitalism, coalowners began to think in terms of private property and attempted to redefine traditional use-rights as theft. Miners (like other workers) resisted such attempts to deprive them of their traditional rights and continued to exercise their "right" to use coal.(53) The existing system of prosecution was an impediment in the enforcement of the legal ownership of coal and the extension of magistrates' summary jurisdiction meant that offences could be dealt with in magistrates' courts which made prosecutions cheaper which, in turn, enabled them to protect their property rights and thus intensify the exploitation of mineworkers.(54)

Summary

In this chapter, we have seen that, although magistrates' courts were placed under the stricter control of central government, the scope of their legal function grew enormously with the expansion of summary justice. As with the other changes that occurred in the position of the magistracy during the C19th, this development was closely linked to the rise of industrial capitalism but, once again, we have seen that it was mediated by the political relations between the bourgeoisie and the gentry. Thus, although the Summary Jurisdiction Acts could be interpreted as the instalation of the framework for a bourgeois legal form and the Criminal Justice Act afforded better protection to bourgeois property, this transformation was not a simple reflection of bourgeois interests.

We have seen that the bourgeoisie were not sufficiently strong in the mid-C19th to impose new legal and political forms and that change was only possible because of the support of an influential section of the gentry. However, the role of the

gentry was not simply to influence the timing of the legislation that was passed but, more importantly, to affect the nature of the transformation that occurred. The system of summary prosecution in the hands of what was still a predominantly gentry magistracy was a continuation (albeit modified) of a form of "justice" that had emerged in earlier historical periods under the rule of the gentry. It reflects the compromise between the bourgeois principle of indirect rule through an autonomous, "impartial" state and the relatively direct form of control that had been developed by the gentry. Thus, although magistrates' courts were incorporated within the legal system, they emerged as a form of crime control concerned with efficient punishment rather than a legal form based upon 'due process'. This contrasts, for example, with the creation of county councils where the intransigency of the gentry, not only delayed reform but also, led to change being imposed in a period when the bourgeoisie were dominant, with the result that a more clearly 'bourgeois' form of local government was established. The fact that an influential section of the gentry supported reform of the system of

prosecution meant that change came at a slightly earlier date when the industrial bourgeoisie were still not the dominant force in Parliament and the opposition of Hume, Roebuck and Wakley had less impact than similar voices had upon the legislation that was passed in 1888. In other words, the contradictory nature of the modern magistrates' courts as a system of crime control with some of the trappings of due process reflects the compromise that was reached in the mid-19th century between the interests of the bourgeoisie and the gentry.

CHAPTER NINE

SUMMARY AND CONCLUSION

Our examination of the historical development of the English magistracy is now complete. In this chapter, we will summarise our major arguments and draw out the importance of this historical analysis for an understanding of the way in which justice is administered in modern magistrates' courts.

We began by looking at a number of empirical studies and found that, both of the two main traditions, contain inherent limitations which have prevented them from addressing structural questions about the role and functions of the magistracy. In the case of positivist studies, the weaknesses in their methodology were so debilitating that they are able to tell us very little beyond the fact that there is a wide discrepancy in the sentencing rates of different courts, and between different magistrates within the same courts. Interactionist studies have generally fared better in that they have been able to offer convincing accounts of the importance of

informal criteria, based upon their detailed observations of the complex social drama that is enacted in court. Moreover, through their presence in the courtroom, they have drawn our attention to a wide range of characteristics of the nature of magistrates' justice which could only be revealed through observation.

Observational studies have offered a thorough description of the manner in which justice is administered in the magistrates' courts. However, their implicit commitment to methodological individualism has rendered them unable to provide an adequate explanation of why it has taken this form. By focussing exclusively upon events inside the courtroom, they have taken for granted the structure of the legal system in which the courtroom drama is played out. This has led to several equally mistaken positions. A number of interactionists have totally ignored the structural dimension, with the result that they implicitly present the legal inequalities that they document as the product of the exercise of discretionary powers by magistrates and other court personnel.

Other, more eclectic, observational studies,(1) which have not shared the same commitment to the individualist position of symbolic interactionism or ethnomethodology, have made attempts to explain the judicial system that produces a fast, 'conveyor belt justice', resulting in a high proportion of guilty pleas and convictions. Their accounts have invariably drawn upon the work of Blumberg and Packer(2) to portray magistrates' courts as a form of 'administrative justice'. The essential argument is that regular court personnel develop informal, routine arrangements to enable them to handle the enormous volume of work confronting magistrates' courts. This sub-species of observational study, with its references to models of the legal system (Due Process, Crime Control and Liberal Bureaucratic) and its portrayal of magistrates' courts as a bureaucracy, appears to locate interpersonal interaction within a structural analysis of the legal system. However, their explanations are founded upon their unquestioned assumption that the British legal system embodies the principles of due process. They take it for granted that this is how the law is intended to be administered and they, therefore suggest

that the crime control characteristics of magistrates' courts are 'deviations' or 'irregularities' that arise solely from the actions of court personnel.

The falsity of this implicit dichotomy between 'the law in action' and 'the law in the books', or crime control and due process, has been convincingly demonstrated by Doreen McBarnet. Her work stands out amongst studies of magistrates' courts as a pioneering attempt to locate the findings of observational studies within a genuine analysis of the British legal system. However, although she has shown that many of the supposed departures from due process are a product of legal policy, she does not offer an explanation of why this should be the case. Our study has provided the historical analysis of the development of the magistracy that McBarnet has often acknowledged the necessity for, but which she has not produced.

The modern magistrates' court was forged in the middle part of the C19th but we have also looked further back to the earlier stages in the development of the English magistracy. In doing

this, we have been able to understand the later changes more fully. In particular, it has enabled us to analyse the nature of the existing legal and political forms centred upon the magistracy and their importance in the rule of the gentry.

An appreciation of this relationship between the gentry and the magistracy is helpful because it underpins the transformation of the English magistracy that occurred during the C19th. Although the creation of the modern magistrates' court was closely related to the growth of industrial capitalism, it was neither an inevitable product of the logic of capitalist development, nor a straightforward victory for the bourgeoisie. Rather, it was the outcome of the class struggle that arose from the particular social formation of nineteenth century British capitalism. The industrial bourgeoisie were an important component of this formation but, the gentry maintained a good deal of political strength until late in the C19th which they used to attempt to protect their traditional power base in the county magistracy.

The legal and political forms that emerged during this period

reflect the series of compromises between these two sections of the ruling class. In our discussion we have focussed upon the three major dimensions in the transformation of the magistracy - the replacement of the unrepresentative administration of the counties by elected county councils, the (partial) replacement of the traditional system of order maintenance by the new police and, changes to the system of prosecution resulting in a massive expansion of magistrates' powers of summary jurisdiction. The proposals contained in the various measures that were introduced on these issues constituted a direct challenge to the authority of the gentry or to principles to which they held firm, but they affected the gentry differently and this, in turn, altered the nature of the compromise reached.

In the case of local government reform, the retention of the existing system did not constitute a problem either for the maintenance of order or the protection of property and the representatives of the gentry in Parliament were able to offer a solid resistance, until a change in the composition of the

Commons forced them to concede. Ironically, this resulted in a greater victory for the bourgeoisie. By the time that legislation was finally passed in 1888, the industrial bourgeoisie were a far stronger force and they were able to impose democratically elected county councils, with the magistracy retaining only their limited role on police committees. The creation of the new police reflects a different set of circumstances. Here, the threat of an organised working class, which was at least as great to the gentry as it was to the bourgeoisie, highlighted the common interests of the two groups and a compromise was reached fifty years earlier. This enabled the gentry, in their capacity as magistrates, to retain a significant degree of control over the administration and deployment of county police forces.

The political formation on the issue of reform of the system of prosecution was more complex, with sections of both the bourgeoisie and the gentry on both sides of the divide. Whereas they had been forced (for different reasons) to accept both elected county councils and the creation of county

police forces, a section of the gentry, not only supported but, were instrumental in the extension of summary justice. This active support, particularly from coalowners, meant that the system of prosecution was reformed at a time when the gentry retained their political dominance. This had an important effect on the nature of the legal form that was created in its place. The system of summary justice in magistrates' courts can be seen as a continuation of the legal forms developed by the gentry in earlier historical periods. This is not to say that the transformation of the magistracy into courts of summary justice was simply a reflection of the interests of the gentry - as we have seen, the bourgeoisie also supported a reform of the system of prosecution. Rather, the form that emerged was a compromise between these two groups. Thus, the Summary Jurisdiction Acts provided some of the trappings of an 'impartial' legal form within the orbit of the modern state, but "justice" was still to be administered by an unrepresentative, largely gentry, magistracy without the benefits of the protection of the principles of due process that had disappeared with the erosion of the right to a trial by jury.

The particular nature of this compromise has a direct bearing on the question of why magistrates' justice diverges from the principles of due process and exhibits so many characteristics of a form of crime control. What we have shown is that it results from the nature of the particular formation of British capitalism in which the modern magistrates' court was forged. The English magistracy was transformed, during the 19th, into a lower court of summary justice precisely to act as an efficient means of crime control. Although court procedures were reformed to remove the worst excesses of magistrates' authoritarianism within the courtroom, the clear purpose behind the extension of summary jurisdiction was to create an efficient system of punishment which consciously eroded the due process of law by abolishing jury trials for minor property offences. Thus, the false dichotomy that McBarnet has pointed to, between crime control and due process, is not simply the product of recent legal policy initiatives but rather it is inherent in the nature of the form of the modern magistrates' court. Although their structure has not remained static since 1855, modern magist-

rates' courts still operate within the broad framework that was laid down in the mid-C19th. Thus, the characteristic features of the modern magistrates' court (such as, the lack of due process, the speed of trials, the intimidation of defendants and, one might want to add the undemocratic nature of selection) result from the compromise that was reached between the bourgeoisie and the gentry in establishing the system of summary prosecution that still exists in its essentials today.

FOOTNOTES

CHAPTER ONE

1. For a sophisticated treatment of this argument see K. Popper Of Clouds and Clocks in K. Popper Objective Knowledge.

Less sympathetic discussions can be found in: D. Walsh Sociology and the Social World & Varieties of Positivism both in P. Filmer et. al. New Directions in Sociological Theory; A. Cicourel Method and Measurement in Sociology, and; J. Douglas Understanding Everyday Life.

2. The degree to which social scientists using these techniques accept these assumptions and their implications varies considerably and the data gathered from this type of research has been treated in a variety of different ways - some crude and others very sophisticated. We should therefore be wary of generalising too freely about the use of positivist methods in social science. Nevertheless, in the case of studies of law courts, there is a clearly identifiable tradition in which positivist assumptions are both clearly present and accepted uncritically.
3. See, for example, H. Bullock The Significance of the Racial Factor In The Length of Prison Sentences reproduced in R. Quinney (ed) Crime and Social Justice in Society. In this study of prisoners in the Texas State Prison at

Huntsville in 1958, Bullock found that Blacks received significantly different sentences from Whites. Blacks convicted of murder were likely to receive shorter sentences than Whites and, Blacks convicted of burglary were likely to receive longer sentences than Whites.

See also, H. Garfinkel A Research Note On Inter- and Intra-Racial Homicides, Social Forces, 27, 1949, and P. Gordon White Law.

4. V. Aubert Conscientious Objectors Before Norwegian Military Courts in G. Schubert (ed) Judicial Decision-Making.
5. R. Hood Sentencing In Magistrates' Courts, 1962, p.12
These statistics are for males aged 21 and over who were found guilty of indictable offences.
6. E. Green Sentencing Practices of Criminal Court Judges reprinted in R. Quinney (ed) Crime and Justice in Society
7. For a discussion of the interactionist critique of official statistics see, for example; S. Box Deviance Reality and Society, A. Cicourel Method and Measurement In Sociology, J. Kitsuse & A. Cicourel A note On The Use of Official Statistics, and P. Filmer et al op cit.
8. V. Aubert op cit, p.207.

9. Hood used the following criteria in his attempt to construct a measure of "criminality":

- (a) The number of previous convictions for criminal offences.
- (b) The number of prison or borstal sentences already served.
- (c) The regularity or irregularity of work habits.
- (d) The relative number of 'old lags' (i.e. men aged forty and over with four or more previous convictions for indictable offences).
- (e) The proportion of men who have on a previous occasion been given a 'chance' either on probation, at an Approved School, or by some method of discharge.
- (f) Other factors such as age, occupation, marital status, and plea of the defendant.
- (g) The relative seriousness of the offences, measured in terms of the amount of money involved (i.e. under £8, under £32, or over £32 worth); and the number of offences of which the offenders are simultaneously convicted.

R. Hood Sentencing In Magistrates' Courts, 1962, p.29.

10. R. Hood Sentencing in Magistrates' Courts p.47

11. See footnote 9 above.

12. Aubert experienced a similar problem when he looked at the effects of the defendants' occupational background on sentencing decisions. He found that unskilled workers were

much less likely to be acquitted than other defendants. He recognises several possible explanations for this: there may have been a higher percentage of law breakers amongst this group; they may have difficulty in conducting their defence, or; there may be blatant discrimination against unskilled workers. Aubert wants to suggest that the latter is the most important factor but he is unable to do so because he is trapped within the limitations of the official statistics.

V. Aubert Conscientious Objectors Before Norwegian Military Courts

13. This consisted of a composite of the following elements: the density of the population per acre; the percentage of the population living more than two to a room; the percentage of males aged fifteen and over falling into the Registrar General's social classes IV and V, and; the percentage of occupied males aged twenty to twenty-four educated over the age of seventeen. R. Hood Sentencing In Magistrates' Courts p.65

14. R. Hood Sentencing The Motoring Offender, 1972

15. This questionnaire presented the magistrates with the following four stereotyped views of offenders:

Type 1 An average motorist who does something you could imagine yourself doing.

Type 2 A careless thoughtless type of person whose offence arose from not paying adequate attention

to either his driving or the regulations.

Type 3 An anti-social person who has no respect for rules and regulations and the safety of others.

Type 4 The sort of person whose offence arises from a somewhat unstable personality or from emotional problems.

The magistrates were asked to say, for each of seven motoring offences, what proportion of offenders fell into each of the stereotypes.

R. Hood Sentencing The Motoring Offender, 1972 p.37.

16. Ibid p.33.

17. See, for example, I. Taylor, P. Walton & J. Young The New Criminology.

18. R. Hood, Sentencing The Motoring Offender.

19. See, for example, Stanton Wheeler et al Agents of Delinquency Control: A Comparative Analysis. In their study of a juvenile court in the U.S.A., they found that the judges whom they considered to be most "liberal" were more likely to send juveniles to some form of correctional institution. Their explanation for this was that because these judges were more likely to have absorbed a 'social welfare ideology' they were likely to believe that correctional institutions could help the child by offering the necessary "treatment". See also P. Collins The Lenient Magistrate. In his study of the Grunwick hearings

he was specifically interested in the belief, common amongst the lawyers involved in the hearings, that one of the magistrates was more lenient than the others. This assumption was based on the observation that this magistrate made more extensive use of the conditional discharge when dealing with people convicted on the picket lines. However, Collins points out that this assumption was problematic and that rather than being more lenient this magistrate may simply have been more astute than his colleagues on the Bench. Collins suggests that the magistrate knew that fines were likely to be ineffective because they would be paid by the relevant trade union whereas a conditional discharge may be a more effective deterrent because of the fear of being arrested on the picket lines a second time.

For a further example of the difficulties involved in assessing the "severity" of sentences see H. Bullock *op cit*.

20. D. Phillips Knowledge From What?

21. *Ibid*.

22. See *ibid*.

23. R. Hood Sentencing The Motoring Ofender.

24. See, for example, D. Phillips *op cit* or N. Denzin The Research Act pp.154-162.

25. R. Emerson Judging Delinquents.

26. See, for example: H. Williamson Magistrates and Juvenile Justice - Their Impact On The Legal Process, unpublished paper presented at the B.S.A. conference, 1979, and; M. Winn Sentencing in a Magistrates' Court unpublished MA dissertation, University of Warwick, 1978. See also P. Carlen Magistrates' Justice.

Emerson's findings have also been broadly confirmed by other U.S. studies. See, for example: A. Cicourel The Social Organisation of Juvenile Justice; A. Platt, H. Schecter & P. Tiffany In Defense Of Youth, Indiana Law Review, 1968.

27. In view of the considerable evidence documenting the existence of plea-bargaining and other practices designed to encourage defendants to plead guilty, that we examine in Chapter Two, Emerson's decision to concentrate on sentencing decisions is a little naive and it restricts the scope of the study unnecessarily.

28. D. Matza Delinquency And Drift.

29. This term is derived from Sudnow's concept of 'normal crimes'. D. Sudnow Normal Crimes, Sociological Problems, XII, (3), 1965, pp.255-276.

30. Emerson found a similar pattern in relation to theft offences. Thefts were regarded as normal when they

involved small amounts and appeared to be for personal gratification. They became criminal when the act suggested a commitment to illegal activity eg., stealing nonchildish goods, demonstrating particular expertise, using special tools, or, showing a lack of concern about causing injury to others. R. Emerson Judging Delinquents pp.113-117

31. See *ibid* p.117.

32. See, for example: A. Cicourel The Social Organisation of Juvenile Justice; A. Platt, H. Schechter & P. Tiffany In Defense Of Youth, Indiana Law Review, 1968; H. Williamson Magistrates and Juvenile Justice - Their Impact On The Legal Process, unpublished paper presented at the B.S.A. conference, 1979, and; M. Winn Sentencing in a Magistrates' Court unpublished MA dissertation, University of Warwick, 1978.

33. Whilst there is a general agreement that the courts categorise defendants there are differences in the precise nature of these categories. Platt & Friedman The Limits of Advocacy : Occupational Hazards in Juvenile Court, University of Pennsylvania Law Review, 116, 1968, suggest that, in the court they observed, the juvenile defendants were categorised into "good" and "bad" kids.

In his study of an English juvenile court, Williamson found that magistrates categorised defendants into one of the following categories:

(a) The 'reformables' - genuinely remorseful defendants

who were unlikely to offend again.

(b) The 'no-hopers' - recalcitrant persistent offenders.

(c) Those 'at the crossroads' - defendants who were in between the other two categories.

In my own study of Coventry magistrates' court, I found that Emerson's categories were broadly applicable although his notion of 'normal' defendants was problematic in that the magistrates seemed reluctant to accept any crime as normal. However, there was a category of defendants for whom the magistrates appeared to have some sympathy who broadly approximated Emerson's "normal" defendants or Williamson's "reformables".

I would suggest that these different classifications reflect the complexities of the process of categorization, the variations between different courts, and, perhaps, the different understandings of the researchers. They raise questions about the detail of Emerson's analysis but they confirm the main thrust of his argument - i.e. that judges and magistrates label defendants and then sentence them on the basis of this label.

34. Emerson cites the example of a policeman who was asked, by the judge, whether the damage to a car windscreen was consistent with a shot from a BB gun. The policeman said that it was not and, as a result, the defendant was found "not delinquent". However, in conversation with Emerson afterwards, he said that the damage was consistent with a pellet from a "pop gun". By withholding this information

the policeman completely transformed the court's perception of what happened in order to obtain the outcome he desired.

See, R. Emerson op cit, p.111.

35. H. Becker Sociological Methods.

36. P. Filmer et. al. New Directions in Sociological Theory; J. Douglas Understanding Everyday Life; A. Schutz Concept and Theory Formation In The Social Sciences in D. Emmet & A. MacIntyre (eds) Sociological Theory and Philosophical Analysis.

37. J. Atkinson & P. Drew Order In Court.

38. See, for example, P. Carlen Magistrates' Justice. In Chapter Two we will see the problems that she has in addressing such questions from a broadly interactionist perspective.

CHAPTER TWO

1. See, for example, P. Carlen Magistrates' Justice and M. Winn Sentencing In A Magistrates' Court.

2. Maureen Mileski, for example, found that 72% of the cases in her study were handled in less than one minute. See also P. Carlen Magistrates' Justice; M. King (ed) Guilty

Until Proved Innocent, and; M. Winn Sentencing In A Magistrates' Court.

3. M. King also found evidence of this pattern. He suggests that the use of ritual language by courtroom habitues tends to dismantle the defendant's confidence which may, in turn, explain such phenomena as giggling in the courtroom, "courtroom deafness", and answering questions in monosyllabic utterances. (M. King Roles and Relationships In The Magistrates Courts, unpublished LLM Thesis, University of Warwick, Dec.1976)

Howard Parker, in his study of a group of teenage boys also found that the boys were unable to express themselves properly in court because they were unable to operate within the formal framework demanded by the magistrates and other court personnel. H. Parker A View From the Boys.

4. D. McBarnet Conviction p.126

5. Ibid pp.124-133.

6. Ibid pp.134-138.

7. Ibid p.137.

8. King in his study of 5 urban courts found that 80% of defendants making their first appearance in court after being charged with a non-motoring offence were not represented. (M. King The Framework of Criminal Justice)

Zander found that in the 12 London courts and 4 courts outside of London studied by his students only 9% of those defendants pleading guilty and 37% of those pleading guilty were represented at the hearing of their cases. (M. Zander Access to a Solicitor in the Police Station)

Bottoms and McLean in their study of Sheffield magistrates' courts found that 81% of defendants were not legally represented. (A. Bottoms & J. McClean Defendants in the Criminal Process).

9. A. Blumberg The Practice of Law As A Confidence Game p.22.
10. See, for example: S. Dell Silent In Court; A. Bottoms & J. McClean Defendants In The Criminal Process; C. Davis The Innocent Who Plead Guilty; J. Baldwin & M. McConville Negotiated Justice; D. Sudnow Normal Crimes; D. Newman Conviction; A. Platt & R. Friedman The Limits Of Advocacy; P. Carlen Magistrates Justice; M. King Roles and Relationships In The Magistrates Courts; Z. Bankowski & G. Mungham Images Of Law; D. Newman Pleading Guilty For Consideration; State Research Bulletin No.21; M. Winn Sentencing In A Magistrates' Court.
11. According to McBarnet, modern magistrates' courts deal with 98% of all court cases. (D. McBarnet Conviction p.122) King estimates that they deal with nearly one million people each year on criminal charges alone. (M. King The Framework of Criminal Justice p.33).

12. See A. Bottoms & J. McLean Defendants in the Criminal Process; D. McBarnet Conviction; S. Dell Silent in Court M. Zander Unrepresented Defendants in the Criminal Courts and J. Baldwin & M. McConville Negotiated Justice.

The figures range from 76% to 94% compared to 55% to 75% in higher courts but although there are differences in the results of the major studies they are all agreed that the vast majority of defendants plead guilty.

The proportion of defendants convicted in magistrates' courts is higher still - about 95%. According to McBarnet, 93% of defendants charged with non-indictable offences and 95% of those charged with indictable offences are convicted. (D. McBarnet Conviction p.2). Bottoms and McClean discovered a 98.5% conviction rate in Sheffield magistrates' court. (A. Bottoms and J. McCLean Defendants in the Criminal Process p.106).

13. See, for example, M. King (ed) Guilty Until Proved Innocent.

14. See, for example, Z. Bankowski & G. Mungham Images Of Law; M. King Roles and Relationships In The Magistrates Courts; A. Bottoms and J. McLean Defendants in the Criminal Process; P. Carlen Magistrates' Justice, and; A. Blumberg Criminal Justice.

15. A. Bottoms & J. McLean Defendants in the Criminal Process
ch.8.
16. H. Packer Two Models of the Criminal Process.
17. Ibid p.15.
18. Ibid p.9.
19. Ibid p.10.
20. D. McBarnet Pre-Trial Procedures and the Construction of Conviction p.184.
21. Ibid p.185.
22. Ibid p.190.
23. Ibid p.193.
24. Ibid p.192.
25. Ibid p.187.
26. D. McBarnet Conviction p.136.
27. Ibid p.125.

CHAPTER THREE

1. See below, pp. 108 - 112.
2. See, for example, D. Philips Crime and Authority In Victorian England; J. Stevenson Popular Disturbances In England 1700 - 1870; R. Storch The Policeman As Domestic Missionary and The Plague Of Blue Locusts; R. Quinault The Warwickshire County Magistracy and Public Order, 1830 - 1870, and; V. Bailey The Dangerous Classes In Late Victorian England.
3. H. Fielding An Enquiry Into The Causes Of The Late Increase Of Robbers, Etc.; P. Colquhoun A Treatise On The Police Of The Metropolis and A Treatise On The Commerce And Police Of The River Thames; E. Chadwick Preventive Police, and; E. Wilmot A Letter To The Magistrates Of England On The Increase Of Crime And Its Effecient Remedy
4. E. Thompson The Peculiarities Of The English and The Poverty Of Theory.
5. See, for example, the discussions of the 1839 County Police Act in Chapter Seven and the extension of summary jurisdiction in Chapter Eight.
6. See, for example, R. Storch op cit and M. Ignatieff Police and People.

7. Parliamentary Debates, vol.244, c.1199.
8. Parliamentary Debates, vol.96, cc.4-7.
9. M. Weber Class Status And Party in H. Gerth & C. Mills
From Max Weber p.180 (Routledge & Kegan Paul, London,
1948).
10. Ibid p.181.
11. Ibid p.182.
12. See, for example, A. Giddens The Class Structure Of The
Advanced Societies (Hutchinson, London, 1973); G. Carchedi
On The Economic Identification Of Social Classes
(Routledge & Kegan Paul, London, 1977); N. Poulantzas
Classes In Contemporary Capitalism (Verso, London, 1978),
and; E. Wright Class Boundaries In Advanced Capitalist
Societies New Left Review, 98, 1976.
13. Not all recent debates have been restricted solely to the
later C20th. The debate centring around the Gramscian
concept of hegemony has produced contributions which have
been concerned with an analysis of C19th England. Of
particular interest is Robert Gray's article Bourgeois
Hegemony In Victorian England in J. Bloomfield (ed)
Class, Hegemony and Party. However, although Gray comments
on the relationship between the bourgeoisie and the
gentry, his central concern is to explain the character of

the English working class. Because the concerns of this thesis are rather different, I have chosen not to include a critical examination of Gray's work. To have done so would have taken us too far away from the issues which I wish to address in this chapter.

14. E. Thompson Eighteenth Century English Society: Class Struggle Without Class p.147.
15. E. Thompson The Poverty Of Theory p.238.
16. E. Thompson Eighteenth Century English Society: Class Struggle Without Class.
17. G. Jones History And Theory History Workshop Journal, No.8, p.201.
18. S. Clarke Socialist Humanism And The Critique Of Economism p.154.
19. R. Johnson Edward Thompson, Eugene Genovese, And Socialist-Humanist History p.92.
20. H. Perkin The Origin Of Modern English Society p.39 (Routledge & Kegan Paul, London, 1969).
21. E. Thompson The Peculiarities Of The English p.42.

22. For a more detailed discussion of the growth of agrarian capitalism and the rise of the gentry see Chapters Four and Five.
23. See, P. Anderson Socialism and Pseudo-Empiricism and R. Johnson Peculiarities Of The English Route.
24. See, E. Thompson Patrician Society, Plebian Culture and Eighteenth Century English Society.
25. See, for example, E. Thompson Eighteenth Century English Society p.163.
26. See, Chapter Eight. See, also, H. Perkin op cit ch.10; F. Thompson English Landed Society In The Nineteenth Century p.285, and; H. Perkin Land Reform And Class Conflict In Victorian Britain in J. Butt & I. Clarke (eds) The Victorians And Social Protest p.182.
27. H. Perkin The Origin Of Modern English Society pp. 273, 303, 316 & 340.
28. Ibid p.172. See, also, E. Thompson Eighteenth Century English Society p.165.
29. H. Perkin op cit p.214.
30. Ibid

31 Ibid p.227.

32. P. Anderson Origins Of The Present Crisis p.20. This position has been reiterated in his recent reopening of the debate. See, P. Anderson The Figures Of Descent New Left Review, Jan/Feb 1987, p.27.

33. R. Johnson The Peculiarities Of The English Route p.20. See, also, E. Thompson The Peculiarities Of The English.

34. H. Perkin op cit p.272.

CHAPTER FOUR

1. C.Beard The Office of Justice of the Peace in England ch.1.

2. H.Hazeltine Preface to E.Dowdell A Hundred Years of Quarter Sessions 1932.

3. L.Page Justice of the Peace 1947, ch.1.

4. See, for example, B.Osborne Justices of the Peace 1361-1848.
5. E.Moir The Justice of the Peace 1969, p.17.
6. L.Page Justice of the Peace
7. E.Moir The Justice of the Peace
8. This Act stated:

That in every county of England shall be assigned for the keeping of the peace, one lord and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power to restrain the offenders, rioters, and all other berators, and to pursue, arrest, take and chastise them according to their trespass or offence; and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; and also to inform them, and to enquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labor as they were wont in times past; and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be [not] of good fame where they shall be found, sufficient surety and

mainprise of their good behaviour towards the king and his people, and the other duly to punish; to the intent that the people be not such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor other passing by the highways of the realm disturbed, nor [put in the peril which may happen] of such offenders; and also to hear and determine at the King's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid; and that writs ofoyer and determiner be granted according to the statutes thereof made, and that the justices which shall be thereto assigned be named by the court and not by the party. And the king will that all general inquiries before this time granted with any seignories for the mischiefs and oppressions which have been done to the people by such inquiries, shall cease utterly and be repealed: and that fines which are to be made before justices for a trespass done by any person be reasonable and just, having regard to the quantity of the trespass and the causes for which they may be made.

Quoted in C. Beard The Office of Justice of the Peace in England pp.40-41

9. According to Moir (The Justice of the Peace p.18) this power was lost between 1364 and 1368, and 1382 and 1389, when the justices were replaced by special emergency

commissions.

10. E.Moir The Justice of the Peace p.18.
11. Ibid p.19.
12. C.Beard The Office of Justice of the Peace in England
P.60.
13. Ibid pp.60 - 61.
14. Ibid p.62.
15. Ibid p.94.
16. See B.Osborne The Justices of the Peace 1361 - 1848 p.26
and C.Beard The Office of Justice of the Peace in
England ch.5.
17. C.Beard The Office of Justice of the Peace in England
p.86.
18. Ibid ch.5.
19. S.& B.Webb English Poor Law History Part One: The Old
Poor Law, Volume 1 pp.52-53.
20. S.& B.Webb English Poor Law History Part One: The Old
Poor Law, Volume 1 p.54.

21. C.Beard The Office of Justice of the Peace in England
P.91.
22. Ibid p.64.
23. Ibid ch.5.
24. Ibid p.80.
25. S.& B.Webb The Story of the King's Highway ch.2.
26. C.Beard The Office of Justice of the Peace in England
P.84.
27. S.& B.Webb English Prisons Under Local Government ch.1.
28. C.Beard The Office of Justice of the Peace in England
ch.4. See also, B.Osborne The Justices of the Peace 1361
- 1848 p.26.
29. S.& B.Webb The History of Liquor Licencing p.8.
30. C.Beard The Office of Justice of the Peace in England
ch.3.
31. Ibid.
32. Ibid ch.4.

33. Ibid.

34. B.Osborne The Justices of the Peace 1361 - 1848 p.67.

35. B.Osborne The Justices of the Peace 1361 - 1848.

36. C.Beard The Office of Justice of the Peace in England
p.34.

37. Redlich's position has been accepted by the Hammonds. When writing about the 18th century, they say that although magistrates were theoretically representatives of the Crown they were in fact autonomous rulers. They go on to say: "Thus although the system of the magistracy, as Redlich and Hirst pointed out, enabled the English constitution to rid itself of feudalism a century earlier than the continent, it ultimately gave back to the landlords in another form the power they lost when feudalism disappeared." (J.L. & B. Hammond The Village Labourer 1978, p.xlii).

38. For contributions to this debate see M.Dobb Studies in the Development of Capitalism and the series of articles contained in R.Hilton (ed) The Transition From Feudalism To Capitalism.

For a different interpretation see P.Anderson Lineages of the Absolutist State and Passages From Antiquity To Feudalism.

39. R.Hilton The English Peasantry in the Later Middle Ages
p.18.
40. R.Hilton Bond Men Made Free p.151.
41. Ibid.
42. For example, Beard mentions a statute (3 Hen.VII, c.12) which sought to compel J.P.s to execute laws faithfully and which tried to provide a remedy for anyone aggrieved at the way in which they enforced the law. He mentions another statute (33 Hen.VIII, C.10) which gave Star Chamber powers to restrain, coerce, and punish justices who neglected their duties or violated the law in the exercise of their functions. Beard also mentions an Act (37 Hen.VIII, c.1) which ordered the Justices to divide their shires into districts and which compelled two J.P.s in every district to hold Sessions in every quarter before general sessions. However, according to Beard the most important measure during this era was the statute (34 & 35 Hen.VIII, c.14) which required the clerk of the peace to send brief transcripts to the King's Bench of every indictment, attainder, conviction and outlawry for murder, robbery, felony, or other cause made before the justices of the peace. This was supplemented by another Act which stated that the Lord Chancellor should appoint the Custos Rotulorum who, in turn, appointed the clerk of the peace (Beard, pp.76-77). The idea behind this Act was that: "By having a loyal and carefully selected Custos, the crown

was enabled to maintain a strict supervision of the work of the local functionaries." (B.Osborne The Justices of the Peace 1361 -1848 p.59).

43. E.Moir The Justice of the Peace p.17.

44. See, for example, C.Hill The English Revolution p.16.

45. C.Hill Reformation To Industrial Revolution 1967, p.57.

46. P.Anderson Lineages of the Absolutist State p.141

CHAPTER FIVE

1. In practice, Quarter Sessions rarely used this power and preferred to leave such cases for the Assize Judge.

2. S. & B. Webb The Parish and the County pp.298-299 fn.

3. Ibid p.27.

4. "It was to the local justices that the Surveyor had to report upon the state of the roads; it was from them that he received the charge on his appointment; it was to them that he looked for any orders or directions as to the work to be done; and it was to them that he rendered his accounts. If more money was needed than was supplied by customary sources and casual receipts, it was the Justices in Quarter

Sessions who ordered a Highway Rate."

5. Ibid p.31.
6. Ibid p.301.
7. Ibid p.306.
8. Ibid p.300.
9. Ibid p.307.
10. See, for example, J. Stevenson Popular Disturbances In England 1700 - 1870.
11. B. Keith-Lucas Introduction to S.& B. Webb The Parish and the County p.x.
12. S.& B. Webb The Parish and the County p.539.
13. See for example, B. Osborne Justices of the Peace 1361-1848 p.210.
14. See C. Hill The English Revolution p.15.
15. Osborne dates this legislation at 1732. Quinault dates it at 1731.
16. R. Quinault The Warwickshire County Magistracy and Public Order p.185.

17. See B. Osborne Justices of the Peace 1361-1848 p.164.
18. Richard Arkwright - the cotton spinner - was appointed to the Derbyshire Bench in 1793, and his son in 1815; and three of the Strutts - a mill owning family - were appointed to the Derbyshire Bench in 1827.
19. See L. Radzinowicz A History of the English Criminal Law and its Administration From 1750, Vol.1, ch.1.
20. See, for example, E.P. Thompson Eighteenth Century English Society: Class Struggle Without Class.
21. See E.P. Thompson Whigs and Hunters.
22. D. Hay Crime, Authority and the Criminal Law: Staffordshire 1750-1800., ch.10.
23. Ibid p.576.
24. B. Fine Democracy And The Rule Of Law p.183.
25. Ibid p.184.
26. See, for example, M. Ignatieff A Just Measure of Pain p.25.
27. C. Hill Reformation To Industrial Revolution p. 143.

28. See, S. & B. Webb The Parish and the County p.300; L. Radzinowicz A History Of English Criminal Law And Its Administration From 1750 Vol. I, and M. Ignatieff A Just Measure Of Pain passim.
29. See, for example, S. & B. Webb The Parish and the County p.345 and p.390 fn.
30. See, for example, S. & B. Webb The Parish and the County and J.L. & B. Hammond The Village Labourer.
31. D. Williams The Rebecca Riots p.169.
32. S. & B. Webb The Story of the King's Highway p.126.
33. J.L. & B. Hammond The Village Labourer. pp.72-73.
34. See, for example, G. Rude The Crowd In History: E. Hobsbawm Primitive Rebels: E.P. Thompson The Moral Economy of the English Crowd In The Eighteenth Century: E.P. Thompson Patrician Society, Plebian Culture: E.P. Thompson Eighteenth Century English Society - Class Struggle Without Class.
35. E.P. Thompson Patrician Society, Plebian Culture p.403.
36. See, for example, J. Stevenson Food riots in England p.56 and E.P. Thompson The Crime of Anonymity.

37. L. Radzinowicz A History of the English Criminal Law and its Administration From 1750, Vol.4, pp.140-141.
38. See, for example, F.M.L. Thompson English Landed Society in the Nineteenth Century p.110: P. Richards Patronage In British Government p.156: I. Bowen Grand Juries, Justices of the Peace and Quarter Sessions in Wales pp.84-85: D. Phillips The Black Country Magistracy.
39. Rose goes on to say that those rioters who were prosecuted were dealt with leniently by the magistrates and he also cites one case in which a witness was intimidated. He concludes by saying:

It may be that the Priestley Riots ought to be regarded in retrospect as an episode in which the "country gentlemen" called out the urban mob to draw the dissenting teeth of the aggressive and successful Birmingham bourgeoisie. Only when this was done was it possible to organize an Anglican and anti-reforming party from the remnants, in the shape of the 'Birmingham Association for the Protection of Liberty and Property Against Republicans and Levellers', formally constituted in December 1792.

... The balance of the evidence suggests that the disorder was not a calculated instrument of political warfare. Rather it was an explosion of latent class hatred and personal lawlessness triggered-off by the fortuitous coming together of religious animosities

and new social and political grievances which the attack on such men as Joseph Priestley symbolised.

R. Rose The Priestley Riots of 1791 p.84

Stevenson cites similar occurrences in other parts of the country. When discussing an incident in Manchester, he says: "Unopposed by the local magistracy the crowds went on to attack the house of Thomas Walker, the leader of the Manchester Constitutional Society." Similarly, he describes an incident in Nottingham in which: "The tenements and mill workshops of one of the most prominent dissenters who opposed the war, Robert Denison, were burned down while the magistrates stood by." (J. Stevenson Popular Disturbances In England 1700-1870 p.141)

40. D.J.V. Jones Before Rebecca p.169.

41. See, for example, J.L. and Barbara Hammond The Town Labourer ch.4. They cite the case of a parson magistrate who in 1817 had two men flogged at the whipping post for distributing Cobbett's pamphlets and another case in which the vicar of Chudleigh detained a man in the House of Correction because his travelling peep show included a colour picture of Peterloo.

42. See, for example, E.P. Thompson The Making of the English Working Class p.150 fn in which he says:

For example, James Hindley of Leeds was sentenced in 1794 to two years imprisonment for selling seditious

writings. At Leicester George Bown was arrested in 1794, but released after several months without facing trial. At Sheffield James Montgomery, who tried to continue Joseph Gale's work by publishing the more seditious *Iris*, was twice imprisoned (for three months and six months) in 1795.

43. Thompson cites a case in Manchester in 1792 when publicans were asked to sign a declaration refusing to allow Jacobins to use their rooms. Those who failed to sign were told that their licences would not be renewed. (E.P. Thompson The Making Of The English Working Class p.124).
44. This attitude towards political meetings was reflected most dramatically at St. Peter's Fields in Manchester 1819 when the magistrates and yeomanry were responsible for the brutal attack on the working people who had assembled to listen to Orator Hunt, but this was not the only occasion that magistrates had troops ready. See E.P. Thompson The Making Of The English Working Class ch.15
45. E.P. Thompson The Making Of The English Working Class p.633
46. J. Stevenson Popular Disturbances In England 1700-1870 p.118.

CHAPTER SIX

1. Under the Licencing Act (1828), magistrates lost the power that they had in Brewster Sessions to insist on the good character of applicants for new licences; refusal to renew licences could be appealed to the Quarter Sessions, and; off-sales could be made without a licence.

Another Licencing Act removed the last remnants of their control over ale-houses. Under this Act, any ratepayer could open their house as a beer-shop simply by paying a fee of two guineas to the office of excise. (S.& B. Webb The Parish and the County ch.6)

2. The 1833 Factory Act transferred the power of inspecting cotton factories (which had been vested in the magistracy in 1802) to the Home Office. (S.& B. Webb The Parish and the County ch.6.)
3. Under the General Highways Act (1835) magistrates lost all authority over the administration of highways: individual justices were effectively stripped of their power to stop up footpaths, and; Quarter Sessions lost the right of formally appointing the Surveyor of Highways. (S.& B. Webb The Parish and the County ch.6. and S.& B. Webb Statutory Authorities For Special Purposes p.470.)
4. The 1835 Prisons Act made magistrates clearly subordinate to the Home Office. Magistrates were compelled to abide by the rules framed by the Home Office and the administration

of prisons was monitored by government inspectors. (S.& B. Webb The Parish and the County ch.6. and S.& B. Webb Statutory Authorities For Special Purposes p.470.)

5. See, for example, S.& B. Webb The Parish and the County ch.6.
6. Hobhouse's Act (1831) which established Vestries in the Metropolis and other "popular parishes" and the Lighting and Watching Act (1833) which established a system of street lighting provided no role for magistrates. (S.& B. Webb The Parish and the County ch.6. and S.& B. Webb Statutory Authorities For Special Purposes p.470.) Similarly, the Acts of 1836 and 1837 instituting a centralised system of births, deaths and marriages, entirely ignored the Justices. (S.& B. Webb Statutory Authorities For Special Purposes p.470).
7. S.& B. Webb The Parish and the County ch.6. and S.& B. Webb Statutory Authorities For Special Purposes ch.6.
8. S.& B. Webb The Parish and the County p.557.
9. Ibid.
10. B. Osborne Justices of the Peace 1361-1848 p.219. See also D. Williams The Rebecca Riots p.138

11. See S. & B. Webb The Manor and the Borough: Part Two
p.750.
12. 99 of the boroughs that had been visited by the Royal Commission that reported in 1833 were not included.
(Parliamentary Debates vol.28, 5/6/1835, c.542)
13. Parliamentary Debates vol.28, 5/6/1835, c.554.
14. Parliamentary Debates vol.30, 13/8/1835, cc.426-466.
15. Parliamentary Debates vol.30, 14/8/1835, cc.480-500.
The amendment stated that in boroughs of 4 or more wards, only persons who possessed real or personal estate of £1000 or more would be eligible as councillors, and; in boroughs of less than 4 wards, the figure would be £500.
16. Parliamentary Debates vol.30, 17/8/1835, cc.569-574.
17. Parliamentary Debates vol.30, 18/8/1835, cc.629-649.
18. Parliamentary Debates vol.30, 25/8/1835, cc.962-977.
19. Ibid.
20. Parliamentary Debates vol.32 , 29/3/1836, c.762.
21. Parliamentary Debates vol.32 , 29/3/1836, c.817

22. Parliamentary Debates vol.28, 15/6/1835, cc.820-843; vol.28, 22/6/1835, cc.998-1051; vol.28, 23/06/1835, cc.1054-1120; vol.28, 24/6/1835, cc.1181-1200; vol.29, 30/6/1835, cc.86-127; vol.29, 1/7/1835, cc.154-168; vol.29, 2/7/1835, cc.186-217; vol.29, 3/7/1835, cc.232-251; vol.29, 16/7/1835, cc.643-679, and; vol.29, 20/7/1835, cc.737-775.
23. See S.& B. Webb The Manor and the Borough: Part Two p.698.
24. Parliamentary Debates vol.29, 27/7/1835, cc.1096-1099; vol.29, 3/8/1835, cc.1340-1428; vol.30, 10/8/1835, cc.189-195, and; vol.30, 12/8/1835, cc.322-393.
25. See S.& B. Webb The Manor and the Borough: Part Two p.749.
26. See, for example, F. Mather Public Order In The Age Of The Chartists ch.2 and R. Quinault The Warwickshire County Magistracy p.204.
27. Although both were granted charters within a few years of the Act being passed. See, for example, J. Tobias Crime and Police In England 1700 - 1900 ch.5
28. For example, Walsall was the only town in the Black Country that was included in the provisions of the 1835 Act - Wolverhampton was not granted a charter until 1848

and did not gain the right to hold its own Quarter Sessions until 1860. D. Philips Crime and Authority In Victorian England p.35.

29. S. & B. Webb Statutory Authorities For Special Purposes p.470.

30. 7 Will.IV 1836 (508) iii, 117.

31. See Lord John Russell Parliamentary Debates, vol.33, 19/5/1836, c.1118.

32. Parliamentary Debates vol.37, 12/4/1837, cc.1124-1152 and vol.106, 13/6/1849, cc.125-158.

33. Parliamentary Debates vol.43, 6/6/1838, cc.543-551; vol.50, 20/8/1839, cc.465-466, and vol.50, 21/8/1838, cc.471-473.

34. Parliamentary Debates vol.106, 13/6/1849, c.125

35. Parliamentary Debates vol.106, 13/6/1849, cc.125-158

36. Parliamentary Debates vol.108, 5/2/1850, cc.393-397; vol.108, 13/2/1850, cc.737-745, and; vol.109, 13/3/1850, cc.817-838.

37. Parliamentary Debates vol.114, 12/3/1851, cc.1268-1292.

38. Parliamentary Debates vol.119, 8/2/1852, cc.728-746.
39. Parliamentary Debates vol.123, 7/12/1852, cc.123;
vol.124, 23/2/1853, cc.466-487; vol.125, 16/3/1853,
cc.258-285; vol.125, 13/4/1853, cc.1099-1110; vol.127,
12/5/1853, cc.192-194, and vol.129, 13/7/1853.
40. Parliamentary Debates vol.161, 12/2/1861, cc.356-358, and
vol.162, 20/3/1861, cc.98-131.
41. Parliamentary Debates vol.191, 29/4/1868, cc.1542-1559.
42. Those Boards with up to £50,000 rental were to have one
representative, those with between £50,000 and £100,000
were to have two representatives, those with between
£100,000 and £150,000 were to have three and, those with
£150,000 plus were to have four representatives.
Parliamentary Debates vol.196, 11/5/1869, c.602
43. Parliamentary Debates vol.196, 11/5/1869, cc.602-619.
44. See Parliamentary Debates vol.237, 28/1/1878, cc.583-608;
vol.237, 14/2/1878, cc. 1651-1691; vol.237, 18/2/1878,
cc.1853-1915; vol.234, cc.893-943 vol.244, and; 18/3/1879,
c.1199.
45. Parliamentary Debates vol.244, 18/3/1879, cc.1199-1221.

46. J. Redlich & F. Hirst The History of Local Government In England p.174.
47. Parliamentary Debates vol.37, 12/4/1837, cc.1124-1152
48. See, for example, Parliamentary Debates vol.37, 12/4/1837, cc.1124-1152 (speeches by Lennard, Tulk and James); vol.109, 13/3/1850, cc.817-838 (speeches by Graham and Peel)
49. See, for example, F.M.L. Thompson English Landed Society In The Nineteenth Century; C. Zangerl The Social Composition Of The County Magistracy In England and Wales 1831 - 1887, and; H. Perkin Land Reform and Class Conflict In Victorian Britain.
50. See B. Keith-Lucas English Local Government In The Nineteenth and Twentieth Centuries.
51. See, Parliamentary Debates vol.33, 19/5/1836, cc.1117-1118; vol.34, 21/6/1836, cc.680-695, and; vol.37, 12/4/1837, cc.1124-1152.
52. Milner-Gibson Parliamentary Debates vol.124, 23/2/1853, c.467
53. Parliamentary Debates vol.106, 13/6/1849, cc.125-158

54. The House of Commons went into Committee on Milner-Gibson's Bill introduced in December 1852. It was eventually withdrawn because there was not sufficient time to pass the Bill in that particular session but, it has been suggested that if Milner-Gibson had introduced this Bill in February 1852 rather than the uncompromising measure that he in fact introduced there would have been enough time to pass it. However, it is more likely that the opponents of reform were aware of the lack of parliamentary time and were, therefore, content to allow it to proceed unhindered knowing that it would come to nothing.
55. Parliamentary Debates vol.244, 18/3/1879, cc.1199-1221.
56. B. Keith-Lucas English Local Government In The Nineteenth And Twentieth Centuries.

CHAPTER SEVEN

1. H. Fielding An Inquiry Into The Late Increase Of Robbers, Etc. pp.192-194.
2. See Journals of the House of Commons Vol.26, pp.27, 39, 123, 155, 159-60, 190 & 289
3. See Journals of the House of Commons Vol.32, pp.784, 798, 874, 878-883.
4. See Journals of the House of Commons Vol.33, pp.416, 447,

759 and Vol.34, p.13.

5. L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol.III, p.70.
6. Ibid.
7. T. Critchley A History of Police In England ch.2 and L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol.III, ch.2.
8. S. French The Early History Of Stipendiary Magistrates.
9. Ibid p.285.
10. T. Critchley A History of Police In England ch.2.
11. T. Critchley A History of Police In England pp.44-45.
12. T. Critchley A History of Police In England pp.49-50.
13. T. Critchley A History of Police In England p.63.
14. Although many towns such as Birmingham and Manchester were quick to apply for this status.
15. T. Critchley A History of Police In England pp.64-68.
16. T. Critchley A History of Police In England p.67.

17. J. Hart Reform of the Borough Police 1835-1856.
18. T. Critchley A History of Police In England p.91.
19. T. Critchley A History of Police In England p.89.
20. See Parliamentary Debates Vol.133, 22/6/1854, cc.1266-1268; Vol.134, 30/6/1854, cc.750-751; Vol.134, 30/6/1854, c.957, and; Vol.134 3/7/1854, cc.1073-1075.
21. T. Critchley A History of Police In England pp.115-116.
See also Parliamentary Debates Vol.140, cc.229-245.
22. Parliamentary Debates Vol.140, c.236.
23. T. Critchley A History of Police In England pp.115-116.
See also Parliamentary Debates Vol.140, cc.229-245.
24. Ibid.
25. See, for example, D. Hay Crime and Justice in Eighteenth and Nineteenth Century England; J. Palmer Evils Merely Prohibited; M. Ignatieff State, Civil Society and Total Institutions; T. Critchley The History of Police In England and Wales ch.2; M. Ignatieff Police and People; S. Spitzer and A. Scull Social Control In Historical Perspective; D. Hay Property, Authority and the Criminal Law; V. Bailey Introduction to Policing and Punishment in Nineteenth Century Britain; B. Weinberger The Police and

Public in Mid-Nineteenth Century Warwickshire, and D
Philips A Just Measure of Crime, Authority, Hunters and
Blue Locusts.

26. This is not to suggest that there was total agreement. In fact, the extent of opposition varied. There was no voice raised in either House against the 1829 Act or the local Acts passed in 1839. There was some opposition to the 1839 County Police Act from radical M.P.s such as Wakley and Fielden who saw the measure as an attack on 'the people' (Parliamentary Debates Vol.49, c.734 & c.738, and from Disraeli who articulated Tory opposition to the idea of the new police by opposing the centralist principles underlying the Act and the consequent attack on liberty (Parliamentary Debates Vol.50, c.357) but, generally, there was little opposition to this measure. Tory opposition was articulated more forcefully against the 1856 Act but this opposition was directed more towards the element of compulsion incorporated in the measure than the principle of a uniformed police force as such.

On the Metropolitan Police Act see Parliamentary Debates Vol.21, cc.867-884, cc.1487-1488, cc.1750-1753.

On the County Police Act(1839) see Parliamentary Debates Vol.49, cc.727-740, c.1385; Vol.50, cc.6-8, cc.115-118 cc.263-264, cc.354-358, cc.434-437.

On the Birmingham Police Act see Parliamentary Debates Vol.49, cc.938-965, cc.1193-1200; Vol.50, cc.8-10 cc.149-155, cc.209-213, cc.247-248, cc.286-294 cc.368 369

On the Bolton Police Act see Parliamentary Debates

Vol.50, cc.427-434.

On the Manchester Police Act see Parliamentary Debates Vol.50, cc.139-149, cc.248-260, cc.336-382, cc.424-426.

On the County Police Act(1856) see Parliamentary Debates Vol.140, cc.229-245, cc.690-698, cc.2113-2190; Vol.141, cc.1564-1585, cc.1928-1944; Vol.142, cc.293-304, cc.605-614, cc.1398-1400, cc.1673-1676, cc.1894-1895, cc.2048-2050.

See also T. Critchley A History of Police In England; J. Hart Reform of the Borough Police 1835-1856, and J. Hart The County and Borough Police Act 1856.

27. D. Philips A Just Measure of Crime, Authority, Hunters and Blue Locusts p.51

28. Ibid. Other commentators have noted a similar tendency in other branches of legal history. See, for example, D. Hay Crime and Justice in Eighteenth and Nineteenth Century England p.50 and M. Ignatieff State, Civil Society and Total Institutions p.76.

29. Reith provides the best example of this genre but many of the same criticisms apply to Radzinowicz. See, for example, D. Hay Crime and Justice in Eighteenth and Nineteenth Century England and D. Philips A Just Measure of Crime, Authority, Hunters and Blue Locusts.

30. In 1785, Pitt and Macdonald introduced a Bill very similar to that introduced by Peel in 1829 but it was withdrawn

following opposition from the City of London. See L. Radzinowicz A History of The English Criminal law and its Administration From 1750 Vol.3, ch.5 and T. Critchley A History of Police In England pp.35-38.

In 1822, a Committee set up by Peel (then Home Secretary) examined policing but emerged only with proposals for minor reform. See T. Critchley A History of Police In England p47.

In 1826, Peel drew up a plan for setting up a single police force within a 10 mile radius of St. Paul's with the exception of the City. See T. Critchley A History of Police In England pp.47-48

31. See also J. Tobias Crime and Police In England 1700 - 1900 p.76.

32. J. Tobias Crime and Police In England 1700-1900 p.6.

33. See, for example, E. Thompson Time, Work-Discipline And Industrial Capitalism; K. Marx Capital Vol.III pp.818-819, and I. Rubin Essays On Marx's Theory Of Value pp.17-18.

34. J. Palmer Evils Merely Prohibited; D. Sugarman et al Crime, Law and Authority in Nineteenth Century Britain, and L. Radzinowicz A History of the English Criminal Law and its Administration From 1750, Vol.3.

35. See Chapter Three above.

36. According to Shubert there were at least 450 such associations formed between 1744 and 1856. A. Shubert Private Initiatives In Law Enforcement.

37. Ibid p.26.

38. L. Radzinowicz A History of the English Criminal Law and its Administration From 1750, Vol.2, ch.12

39. H. Fielding An Inquiry Into The Late Increase Of Robbers, Etc.

40. T. Critchley A History of Police In England p42.

41. See Parliamentary Debates Vol.49, cc.727-740.

42. Parliamentary Debates Vol.140, cc.229-245.

This was a system resulting from the Penal Servitude Act (1853) whereby those offenders who would have received lesser terms of transportation were released under licence in the U.K.. At first the released men were treated sympathetically but by 1855 this mood had changed and the press expressed considerable concern over the ticket-of-leave system. (See P. Bartrip Public Opinion and Law Enforcement passim.

43. P. Colquhoun A Treatise On The Police of the Metopolis
p.562.
44. Ibid conclusion.
45. Ibid p.348.
46. See B. Fine Struggles Against Discipline p.86.
47. E.P. Thompson Patrician Society, Plebian Culture p.394.
48. Thus, "In eighteenth century Liverpool for example, the
burgesses officially sponsored a bear-baiting through the
town each October tenth to mark the annual election of a
mayor. At Ludlow (Shropshire) the rope for the tradit-
ional tug of war through the town was customarily
purchased out of corporate funds and thrown out by the
mayor himself." (R. Storch The Policeman As Domestic
Missionary p.492).
49. See, for example, D. Philips The Black Country Magistracy
50. See, for example, S. Pollard Factory Discipline and the
Industrial Revolution and N. McKendrick Josiah Wedgewood
and Factory Discipline.
51. R. Storch The Plague Of Blue Locusts p.62.
52. In Storch's terms, their goal was "the administration of a

cultural lobotomy and the implanting of a morally superior lobe." (R. Storch The Problem Of Working Class Leisure p.139).

53. See, for example, R. Price The Working Men's Movement and Victorian Social Reform Ideology and R. Storch The Problem of Working Class Leisure.

54. P. Corrigan State Formation and Moral Regulation In Nineteenth Century Britain.

55. Johnson has shown that even in the schools education did not mean the development of literary or occupational skills. In the period before 1850, these were learnt in the family, the neighbourhood and the trade itself. In the schools, "habits, attitudes, the general 'moral' orientation of the child, were of more concern than the development of skills or the transmission of knowledge." (R. Johnson Notes On The Schooling Of The English Working Class p.47).

56. L. Radzinowicz A History Of The English Criminal Law And Its Administration From 1750 Vol.1, p.93.

57. See, for example, H. Cunningham The Metropolitan Fairs: A Case Study in The Social Control Of Leisure.

58. R. Storch The Plague Of Blue Locusts p.64.

59. Ibid p.84.

60. J. Stevenson Popular Disturbances In England pp.83-86.

61. Ibid p.80.

62. L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol.3, p.89.

63. J. Stevenson Popular Disturbances In England p.88.

64. See Chapter Three.

65. D. Philips The Black Country Magistracy p.170.

66. F. Mather Public Order In The Age Of The Chartists p.58.

67. In the Black Country, Earl Talbot (Lord Lieutenant for Staffordshire) appointed the first industrialist to the Bench in 1836 and by 1859 the coal and iron masters had replaced the large landowners and Anglican clergy as the dominant group on the Bench. (D. Philips The Black Country Magistracy).

68. F. Mather Public Order In The Age Of The Chartists p.63.

69. See, for example, J.L. & B. Hammond The Village Labourer p.77; J.L. & B. Hammond The Town Labourer pp.59 -61,

and; L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol.4, ch.3.

70. J.L.& B. Hammond The Town Labourer pp.61.

71. See, for example, J. Stevenson Social Control and the Prevention of Riots In England p.32.

72. Ibid p.35.

73. S.& B. Webb The Manor and the Borough Part Two p.698.

74. Parliamentary Debates Vol.49, 16/7/1839, cc370-371.

75. Parliamentary Debates Vol.49, 18/7/1839, c442.

76. See R. Quinault The Warwickshire County Magistracy and Public Order 1830-1870.

77. Parliamentary Debates Vol.49, 9/7/1839, c374.

78. E.P. Thompson The Moral Economy of the English Crowd in the Eighteenth Century p.135.

79. Ibid pp.134-135.

80. E.P. Thompson The Making of the English Working Class p.66

81. Ibid p.522.

82. Ibid.

83. E.P. Thompson The Moral Economy of the English Crowd in the Eighteenth Century pp.128-129.

84. E.P. Thompson The Making of the English Working Class pp.595-596.

85. See ibid p.658.

86. Ibid p.604 and pp.657-658.

87. Ibid pp.657-658.

88. Thompson suggests that the two were closely linked. Ibid p.658.

89. J. Stevenson Popular Disturbances In England p.161.

90. They retained these powers until the early C20th. (See R. Geary Policing Industrial Disputes 1893 - 1985).

CHAPTER EIGHT

1. Quoted in W. Lubenow Social Recruitment and Social Attitudes p.249 (original emphasis).

2. This feeling was sufficiently strong to prevent Disraeli from securing a position on the Bench for his brother who had farmed in Buckinghamshire - the Lord Lieutenant refused all attempts to sponsor anyone in trade. F. Milton The English Magistracy p.16
3. C. Zangerl The Social Composition of the Magistracy in England and Wales, 1831 - 1887 pp.119-120.
4. See R. Quinault The Warwickshire County Magistracy and Public Order; R. Shorthouse Justices of the Peace In Northamptonshire, and; W. Lubenow Social Recruitment and Social Attitudes - The Buckinghamshire Magistrates.
5. See D. Foster Class and County Government in Early Nineteenth Century Lancashire; J. Lee Social Leaders and Public Persons - A Study of County Government In Cheshire, and; D. Philips The Black Country Magistracy.
6. See D. Foster Class and County Government in Early Nineteenth Century Lancashire.
7. See S. French The Further history of Stipendiary Magistrates.
8. D. Philips The Black Country Magistracy p.173.
9. Ibid p.171.

10. Ibid p.172.
11. Ibid p.169.
12. Thus in Lancashire landed society had lost its overall majority by 1841 (See D. Foster Class and County Government in Early Nineteenth Century Lancashire) and, in Staffordshire, the coal and iron masters became the dominant group sometime in the late 1840s (See D. Philips The Black Country Magistracy).
13. A fine of £5 to £10 for the first conviction and £10 to £20 for the second conviction. (D. Philips The Black Country Magistracy p.183).
14. Parliamentary Debates Vol.63, 30/5/1842, cc.974-977. See also E. Melling Kentish Sources Vol.VI p.5.
15. B. Abel-Smith & R. Stevens Lawyers and the Courts p.31.
16. 11 & 12 Vict, cap.42.
17. 11 & 12 Vict, cap.44.
18. See, Parliamentary Debates vol.96, 3/2/1848, cc.4-7.
19. This remained the case until 1877 when the Justices' Clerks Act stated that every petty sessional division should have as its clerk a barrister or solicitor (unless

he had been a stipendiary, or had long experience as an assistant clerk) and that he should be paid a salary instead of having to rely on fees. See F. Milton The English Magistracy p.46.

20. For example, Osborne has suggested that:

When present-day Justices meet at their weekly or fortnightly Petty Sessions in hundreds of different places up and down the country their proceedings are substantially governed by the provisions of the Summary Jurisdiction Act...

B. Osborne Justices of the Peace p.227

See, also, *ibid* p.232.

21. The Chief Justice of the day ruled that the Justices had a complete discretion as to whether or not they allowed advocates to appear before them: he thought that justice would be sufficiently well attained in summary proceedings without the niceties of discussion, or subtlety of argument, which are likely to be introduced by persons more accustomed to legal questions.

F. Milton The English Magistracy p.49

22. Parliamentary Debates Vol.96, 3/2/1848, cc.4-7. See also Parliamentary Debates 11/2/1848, and 15/6/1848.

23. The Attorney General Parliamentary Debates Vol.96,
3/2/1848, c.4.
24. See, for example, L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol.III,
p.73.
25. See L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol.I, chs. 10 &16.
26. J. Tobias Crime and Industrial Society In The Nineteenth Century ch.12.
27. See K. Macnab Aspects Of The History Of Crime In England And Wales 1805 - 1860.
28. By the end of Peel's term of office, the death sentence had been abolished for about 100 offences. (E. Melling Kentish Sources Vol.VI).
29. See L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol. V, pp. 618- 624.
30. Ibid.
31. J. Tobias Crime and Police In England 1700 - 1900 p.134.
32. See L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol. I, p. 85.

Philips, in his study of the Black Country, has unearthed some further examples: Ann Thompson (in 1837) and Samuel Smith (in 1842) were both acquitted at the direction of the Chairman of Quarter Sessions because, in each case, the property that they had taken belonged to two people rather than the one named on their indictments; Joseph Palmer was acquitted on a charge of obtaining 18 shillings on false pretences because he had in fact obtained £1, and finally; Philips quotes the following example from the Staffordshire Advertiser.

Mary Ann Boam...(took) her trial on an indictment charging her with stealing one shilling in silver, twopence in copper, and three caps, the property of George Plunket Tunney. Mr. Welch appeared for the prosecution and Mr. Woolrych for the defence.

The prosecutor, a draper, ... was called into the witness-box and stated that his name was Gerald Plunket Tunney.

Mr. Woolrych upon this said he would save the court any further trouble in reference to this case, as the indictment laid the articles as the property of George Plunket Tunney.

The objection was fatal, and the prisoner was discharged.

Quoted in D. Philips Crime And Authority In Victorian England p.107

33. L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol.I, p.93.
34. M. Foucault Discipline and Punish part 2.
35. See D. Philips Crime and Authority in Victorian England p.112. See also L. Radzinowicz A History of the English Criminal Law and its Administration From 1750 Vol.II, ch.3 and Vol.IV, p.75.
36. D. Philips Crime and Authority in Victorian England p.113 (original emphasis).
37. D. Philips Crime and Authority in Victorian England p.114.
38. J. Tobias Crime and Police in England 1700-1900 p.124.
39. Parliamentary Debates Vol.20, 12/3/1829, cc.995-998.
40. (545) vi 419. See 2nd. Report pp.427-431 and p.449.
41. On the Juvenile offenders Bill(1840) see Parliamentary Debates Vol.52, cc.651-659; Vol.53, cc.1134-1140; Vol.54, cc.656-661; Vol.55, cc.767-768.
On the Petty Sessions Bill(1840) see Parliamentary Debates Vol.56, cc.1016-1019.
On the Special Petty Sessions Bill(1842) see Parliamentary Debates Vol.63, cc.94-97.

On the Juvenile Offenders Act(1847) see Parliamentary Debates Vol.89, cc.483-484; Vol.90, cc.188-205, cc.430-440, cc.1012-1022; Vol.92, cc.33-48; Vol.93, cc.2-7, cc.699-701.

On the Juvenile Offenders Bill(1849) see Parliamentary Debates Vol.107, cc.101-107.

On the Juvenile offenders Act(1850) see Parliamentary Debates Vol.108, cc.1129-1135; Vol.109, cc.1199-1205.

On the Criminal Justice Act(1855) see Parliamentary Debates Vol.136, cc.1871-1880, cc.1958-1961; Vol.137, c.384, cc.636-637, cc.1167-1168, Vol.139, cc.1866-1873, cc.2017-2020.

42. M. Foucault Discipline and Punish part 2.

43. M. Foucault Discipline and Punish p.82.

44. See B. Fine Struggles Against Discipline.

45. Another argument which sometimes appears in the Parliamentary Debates linked with the humanitarian arguments is a concern to make the system of prosecution more efficient. See, for example, the speech by Hawes Parliamentary Debates Vol.49, 19/7/1839, c.539.

46. Parliamentary Debates Vol.107, 10/7/1849, cc.101-102.

47. For instance, Cobbett, when speaking in a debate on the administration of the criminal law in 1854, said that if

magistrates sitting in petty sessions were given summary powers to hear guilty pleas for larcenies then it would enable crafty offenders to plead guilty and receive a lesser punishment than they would probably have received from a higher court. Parliamentary Debates Vol.133, 8/6/1854, cc.1298-1301.

Or, when opposing the Metropolitan Police Courts Bill(1839), Law argued that young persons who were sent out by their parents ought to be severely punished. He suggested that this could best be done, not by summary punishment in the magistrates' court but "by means of transportation, for they could hardly be expected to do any good in this country." Parliamentary Debates Vol.49, 31/7/1839, cc.1041-1042.

48. During the debates on the Metropolitan Police Courts Bill(1839) objections were raised on the grounds that powers were being removed from the unpaid magistracy and that the creation of more stipendiaries would lead to more political patronage. See Parliamentary Debates Vol.47, cc.1292-1302; Vol.49, cc.531-550, cc.1038-1042, cc.1385-1387; Vol.50, cc.183-193.

49. See, for example, Knatchbull Parliamentary Debates Vol.47, 4/6/1839, c.1303: Miles Parliamentary Debates Vol.52, 26/2/1840, c.655, and; Barnesby Parliamentary Debates Vol.57, 9/3/1841, cc.82-83.

50. Parliamentary Debates Vol.109, 18/4/1850, c.497.

51. Parliamentary Debates Vol.133, 8/6/1854, c.1300.
52. Parliamentary Debates Vol.139, 6/8/1855, c.1866.
53. See, for example, J. Ditton Perks, Pilferage and the Fiddle and P. Linebaugh Tyburn - A Study Of Crime and the Labouring Poor In London During The First Half Of The Eighteenth Century.
54. P. Linebaugh Tyburn - A Study Of Crime and the Labouring Poor In London During The First Half Of The Eighteenth Century p.434.

CHAPTER NINE

1. See, for example, A. Bottoms & J. McClean Defendants In The Criminal Process.
2. A. Blumberg Criminal Justice and H. Packer Two Models Of Criminal Justice.

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